ARCHBOLD'S SUMMARY

OF THE LAW RELATING TO

# PLEADING AND EVIDENCE

IN

# Criminal Cases;

WITH THE

STATUTES, PRECEDENTS OF INDICTMENTS, &c.,

AND THE

EVIDENCE NECESSARY TO SUPPORT THEM.

BY

JOHN JERVIS, ESQ., Q.C.

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Tenth Edition.

BY W. N. WELSBY, ESQ.,

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# ADVERTISEMENT

TO THE

## TENTH EDITION.

THIS Edition brings down the Statutes to the close of the session 8 & 9 Victoriæ, and the Cases to the following Reports, inclusive:—Moody's Crown Cases, Vol. II; Moody & Robinson's Nisi Prius Cases, Vol. II; Carrington & Kirwan's Nisi Prius Cases, Vol. I; Queen's Bench Reports, Vol. V, Part 4; and Davison & Merivale's Reports in the Queen's Bench, Vol. I, Part 4.

The offences of Forestalling, Regrating, and Engrossing having been abolished by the stat. 7 & 8 Vict. c. 24, the Section relating to them in the former editions has been omitted. And the head of "Fraudulent Bankruptcy" has been transferred from the chapter relating to Offences against Public Justice, to that which treats of Offences against Public Trade, to which it seems more naturally to belong.

*Temple, Jan.* 25, 1846.

# ADVERTISEMENT

TO THE

NINTH EDITION.



In this Edition the Statutes are brought down to the close of the session 5 & 6 Victoriæ, and the Cases to the following Reports, inclusive:—Moody's Crown Cases, Vol. II, Part 1; Moody & Robinson's Nisi Prius Cases, Vol. II, Part 3; Carrington & Marshman's Nisi Prius Cases, Vol. I, Part 2; Adolphus & Ellis's Queen's Bench Reports, New Series, Vol. I, Part 2, and Gale & Davison's Reports in the same Court, Vol. II, Part 2.

The references have been examined and verified.

J. J.

*Dec.* 1*st*, 1842.

# ADVERTISEMENT

TO THE

FOURTH EDITION.

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It has been my anxious wish, in preparing the Fourth Edition of this little Work, to render it deserving of the distinguished favour with which the two first editions were received by the profession and the public. With this view I have carefully expunged the errors which have pervaded the last edition, the work of an anonymous editor, and have endeavoured to arrange, under their appropriate divisions, the recent decisions and modern enactments upon the subject of the Criminal Law. I have found it necessary to reframe most of the indictments in the First Part of the Second Book, which I have done after an attentive consideration of the operative words of the respective statutes; and, to render the Work of more general practical utility, I have thought it expedient to add several additional sections, which, with the other new matter, has considerably augmented the bulk of the Work. The increased utility of the Work will, I trust, be a sufficient apology for the increase in size.

I cannot forego this opportunity of acknowledging publicly my obligations to Mr. Baron Vaughan, by whose indulgence I have been enabled to insert, in the body of the Work, many cases decided by the twelve Judges which are not reported.

J. J.

# PREFACE

TO

# THE FIRST EDITION.

In the year 1812, I collected all the authorities upon the Pleas of the Crown to be found in the text books, the books of reports, &c.; all that could elucidate the subject in Bracton, Britton, Fleta, and the Mirror; the substance of Hale, Hawkins, the Third Institute, Dalton, Foster, and East; all the cases upon the subject in the Year Books, the old reports, and in the modern and recent reports; and all the statutes upon the subject, down to the period at which I made the collection. Of these materials I framed, with infinite pains, a Digest in three volumes, one of which was actually published in the year 1813.

When I contemplated the publication above mentioned, works upon the Pleas of the Crown were extremely scarce; those of repute, upon the subject, were rarely to be had, even at most extravagant prices. But immediately upon the publication of my First Volume, two other works were announced upon the same subject, one of which was published very shortly after it was announced; the other not for nearly two years afterwards. Their being announced, however, had the effect of deterring me from proceeding with my Work: I thought they would amply supply the deficiency of works upon the subject; and I felt too much diffidence in my own ability to enter into competition with the writers of them. Another, and a very elaborate work, has since been added, which has fully confirmed me in my determination not to publish the work I originally contemplated.

As the subject of Evidence in criminal cases, however, had not been treated of by any of these writers, and as some book upon the subject was extremely desirable, I thought I might select from the Work I originally compiled such part of it as related to evidence in criminal cases, and publish it, without subjecting myself to the imputation of wishing to enter into any competition with the learned writers of the Works already extant upon the Pleas of the Crown. I have made this compilation; I have added to it all the cases since decided, and the statutes since enacted, upon the subject; and I have compressed the whole into the smallest compass that appeared to me to be practicable, consistently with perspicuity. I have also added precedents of indictments and other criminal pleadings—not from any idea that this part of the Work was required by the profession, there being already one or two collections of great repute upon the subject—but merely because I found it impracticable to give the evidence in particular cases in the simplified form I was anxious to give it, without also giving, in each case, the particular indictment or pleading the evidence was intended to support. And as I was thus obliged to give the precedents, I thought it desirable, and, indeed, necessary, also to give such a summary of the law relative to pleading in criminal cases generally, as would enable the reader to frame an indictment in cases where he might not be able to find a precedent.

As to the arrangement of my materials, I have endeavoured to make it simple and perspicuous. The Work consists of two books—the First Book, which treats of Pleading and Evidence in criminal cases generally, is divided into two parts: the first, treating of Pleading generally, namely, of indictments, informations, special pleas, demurrers, &c.; the second, treating of Evidence generally, namely of evidence of records, of matters *quasi* of record, of private written instruments, and of parol evidence, the competency and credit of witnesses, &c. &c.

The Second Book, which treats of Pleading and Evidence in particular cases, is divided into four parts:· the first treats of offences against the property and persons of individuals; the second treats of offences of a public nature, namely, offences against the King and his government, offences against public justice, offences against the public peace, offences against public trade, and offences against public police and economy; the third treats of conspiracies; and the fourth, of principals and accessaries.

I have now apprised the reader of what he is to expect in the following work. Trifling as it may appear, it has cost me much time and great labour. I have taken infinite pains to simplify my subject; to reject everything redundant or irrelevant; to compress the whole into the smallest possible compass consistent with perspicuity; and to clothe it in language plain, simple, and unadorned. In fact, my sole object has been, to make this a practically useful book: I neither anticipate nor desire for it a higher commendation.

J. F. A.

*Symond's Inn.*

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# BOOK I.

## PLEADING AND EVIDENCE GENERALLY.

## PART I.

### PLEADING GENERALLY.

## CHAPTER I.

### INDICTMENT.



### SECT. 1.

#### INDICTMENT, WHAT, AND IN WHAT CASES IT LIES.

AN indictment is a written accusation of one or more persons of a crime, preferred to, and presented upon oath by, a grand jury.

It lies for all treasons and felonies, for misprisions of treason and felony, and for all misdemeanors of a public nature at common law. 2 *Hawk. c.* 25, *s.* 4. Thus, it lies for a breach of duty, which is not a mere private injury, but an outrage upon the moral duties of society; *R.* v. *Friend, R & R.* 20: *see R.* v. *Smith,* 2 *C. & P.* 449; for an act of wilful negligence, whereby human life is endangered; *Williams* v. *E. I. Co.,* 3 *East,* 201; for an illegal combination for the purpose of dictating to masters what workmen they shall employ; *R.* v. *Bykerdike,* 1 *M. & Rob.* 179; and for all nuisances of a public nature, though occasioned by an act in itself innocent, if the nuisance be the probable consequence of the act. *R.* v. *Moore,* 3 *B. & Ad.* 184; 1 *Hawk. c.* 75, *ss.* 6, 7. A bare intention merely is not

indictable, except in the case of high treason, where, by 25 *Ed.* 3, *st.* 5, *c.* 2, *voluntas reputabatur pro facto;* but in all cases where the intent to commit a crime is manifested by any overt act, the party may be indicted for an attempt to commit the offence. 1 *Deacon,* 643: *see Reg.* v. *Martin,* 2 *Mood. C. C.* 123; 9 *C. & P.* 213, 215.

If a statute prohibit a matter of public grievance, or command a matter of public convenience, (such as the repairing of highways, or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding. 2 *Hawk. c.* 25, *s.* 4; *R.* v. *Davis, Say.* 133; *and see R.* v. *Sainsbury,* 4 *T. R.* 457. And if the statute specify a mode of proceeding different from that by indictment, then, if the matter were already an indictable offence at common law, and the statute introduce merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by the statute; *R.* v. *Robinson,* 2 *Burr.* 799: *R.* v. *Wigg,* 1 *Ld. Raym.* 1165; 2 *Salk.* 460: *R.* v. *Balme,* 1 *Cowp.* 648.: *R.* v. *Carlisle,* 3 *B. & Ald.* 161; *and see* 2 *Hale,* 191: 1 *Saund.* 195, *n.* (4); or even if a statute prohibit, under a penalty, an act which was before lawful, and a subsequent statute, *R.* v. *Boyall,* 2 *Burr.* 832, or the same statute in a subsequent substantive clause, ordain a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law, or he may proceed in the manner pointed out by the statute, at his option; 2 *Hale,* 171: *R.* v. *Wright,* 1 *Burr.* 543; *and see R.* v. *Jones,* 2 *Str.* 1146: *R.* v. *Harris,* 4 *T. R.* 205; but if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued, and no other; for the express mention of any other mode of proceeding impliedly excludes that of indictment. *R.* v. *Robinson,* 2 *Burr.* 805: *R.* v. *Buck,* 1 *Str.* 679. If a statute make that felony which before was a misdemeanor only, the misdemeanor is merged and cannot be prosecuted; *R.* v. *Cross,* 1 *Ld. Raym.* 711; 3 *Salk.* 193; but if a new mode of punishment, or new mode of proceeding merely be directed, without altering the class of the offence, the new punishment or new mode of proceeding is cumulative, and the offender may be indicted as before for the common law misdemeanor. *R.* v. *Carlisle,* 3 *B. & Ald.* 161. Where a statute enabled the King in council to make certain orders relating to quarantine, a disobedience of these orders was holden to be a misdemeanor at common law, and indictable as such. *R.* v. *Harris,* 4 *T. R.* 202. So, where a corporation were authorized by a public statute to make a towing path on the side of a river, it was holden to be a misdemeanor at common law to obstruct the corporation in the execution of the powers given them by the statute, and of course indictable. *R.* v. *Smith,* 2 *Doug.* 441. *See Com. Dig., Indictment,* (*D*); 1 *Russell,* 44—49.

But an indictment will not lie for a mere private injury against an individual: as for enticing away his apprentice; *R.* v. *Daniel,* 1 *Salk.* 380; entering his close, digging the ground, erecting a shed thereon, expelling him and keeping him out of possession; *R.* v. *Storr,* 3 *Burr.* 1698: *R.* v. *Bake, Id.* 1731; pulling the thatch off a dwelling-house, of which he was in peaceable possession; *R.* v. *Atkins,* 3 *Burr.* 1706, 1707; for excluding commoners by inclosing, *Cro. Eliz.* 90, or the like: the remedy for injuries of this description is by

action only, unless they in some measure concern the Queen, or are accompanied by circumstances which amount to a breach of the peace. *Anon.*, 3 *Salk.* 187. So, an indictment will not lie for the infringement of rights which are merely private, though regulated by a public statute; *R.* v. *Richards*, 8 *T. R.* 634; nor for an act prohibited by a private statute, which tends merely to the damage of a particular individual; *R.* v. *Parkin*, 1 *Sid.* 208, 209; nor will it lie for a mere breach of the bye-laws or customs of a corporation. *R.* v. *Sharpless*, 4 *T. R.* 777: *R.* v. *George*, 3 *Salk.* 188. *See Com. Dig. Indictment*, (*E*): 1 *Russ.* 49—52.

## Sect. 2.

### AGAINST WHOM AN INDICTMENT LIES.

An indictment lies against all persons who actually commit, or who procure or assist in the commission of, crimes, or who knowingly harbour an offender; for each, in contemplation of law, is guilty, and liable to punishment according to the part which he takes in the perpetration of the offence. The capability of committing crimes, however, presupposes an act of understanding, and an exercise of will; and therefore, as no person can be excused from the penalties attaching upon the disobedience of the law, unless expressly designated and exempted by the law, the law has defined what persons and actions are privileged or exempted from the severity of the general punishment of penal laws, in respect of their incapacities or defects, whether natural, affected, accidental, or in respect of civil subjection. A corporation aggregate may also be indicted, by their corporate name, for breaches of duty, such as the non-repair of highways or bridges which it is their duty to repair. *Reg.* v. *Birmingham and Gloucester Railway Company*, 9 *C. & P.* 469; 2 *Q. B.* 47; 2 *G & D.* 236.

We proceed to consider the liability of the respective parties to an offence, and the several grounds of exemption from punishment, under the following heads:—

*Principals in the first degree.*]—The general definition of a principal in the first degree is, one who is the actor or actual perpetrator of the fact. 1 *Hale*, 233, 615. But it is not necessary that he should be actually present when the offence is consummated; for if one lay poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree. *Vaux's case*, 4 *Co.* 44 *b.*; *Fost.* 349; *R.* v. *Harley*, 4 *C. & P.* 269. So, it is not necessary that the act should be perpetrated with his own hands; for if an offence be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree. *See R.* v. *Giles*, 1 *Mood. C. C.* 166: *Reg.* v. *Michael*, 2 *Mood. C. C.* 120; 9 *C. & P.* 356. Thus, if a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the inciter, though absent when the fact was committed, is, *ex necessitate*, liable for the act of his agent, and a principal in the first degree. *Fost.* 349; 1 *Hawk. c.* 31, *s.* 7; *R.* v. *Palmer*, 1 *N. R.* 96; 2 *Leach*, 978.

But if the instrument be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessary before the fact; *R.* v. *Stewart, R. & R.* 363: *Reg.* v. *Williams,* 1 *C. & K.* 589; or, if he be present, a principal in the second degree; *Fost.* 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent. *Reg.* v. *Bannen,* 2 *Mood. C. C.* 309; 1 *C. & K.* 295.

*Principals in the second degree.*]—Principals in the second degree are those who are present, aiding and abetting, at the commission of the fact.

Presence, in this sense, is either actual or constructive. It is not necessary that the party should be actually present, an ear or eyewitness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house watching to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. *Fost.* 347, 350. *See R.* v. *Borthwick,* 1 *Doug.* 207; 1 *Leach,* 66; 2 *Hawk. c.* 29, *ss.* 7, 8; 1 *Russ.* 31; 1 *Hale,* 555: *R.* v. *Gogerly, R. & R.* 343: *R.* v. *Owen,* 1 *Mood. C. C.* 96. But he must be sufficiently near to give assistance; *R.* v. *Stewart, R. & R.* 363; and the mere circumstances of a party going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be *able* to assist in it. *R.* v. *Kelly, R. & R.* 421; 1 *Russ.* 23. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched the prisoner, who, being apprised of the robbery, assisted in carrying away the property, it was holden that he was not a principal, but only an accessary. *R.* v. *King, R. & R.* 332. *See R.* v. *M'Makin, Ibid.*: *R.* v. *Dyer,* 2 *East, P. C.* 767. And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessaries before the fact. *R.* v. *Soares, R. & R.* 25: *R.* v. *Davis, Id.* 113: *R.* v. *Else, Id.* 142: *R.* v. *Badcock, Id.* 249: *R.* v. *Manners,* 7 *C. & P.* 801: *Reg.* v. *Howell,* 9 *C. & P.* 437: *Reg.* v. *Tuckwell, C. & Mar.* 215. So, if one of them have been apprehended before the commission of the offence by the other, he can be convicted only as an accessary before the fact. *Reg.* v. *Johnson,* 1 *C. & Mar.* 218. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals. *R.* v. *Bingley, R. & R.* 446. *See* 2 *East, P. C.* 768. As, if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C., and D. may be indicted for the forgery, and A. as an accessary; *R.* v. *Dade,* 1 *Mood. C. C.* 307; for, if several make distinct parts of a forged instrument, each is a principal, though he

do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *R.* v. *Kirkwood*, 1 *Mood, C. C.* 304.

There must also be a participation in the act; for, although a man be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 *Hale*, 439; *Fost.* 350. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions, in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was present aiding and abetting. So, a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entice the owner away, that he who has the goods may carry them off, all are guilty as principals. *R.* v. *Standley*, *R. & R.* 305; 1 *Russ.* 24: *R.* v. *Passey*, 7 *C. & P.* 282: *R.* v. *Lockett*, *Id.* 300. So, it has been holden, that to aid and assist a person to the jurors unknown to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of this practice. *R.* v. *Moore*, 1 *Leach*, 314. If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the attempt, the latter is a principal in the murder of the other. *R.* v. *Dyson*, *R. & R.* 523. *See R.* v. *Russell*, 1 *Mood. C. C.* 356: *Reg.* v. *Alison*, 8 *C. & P.* 418. So, likewise, if several persons combine for an unlawful purpose, or for a purpose to be carried into effect by unlawful means; *see Fost.* 351, 352; particularly, if it be to be carried into effect, notwithstanding any opposition that may be offered against it; *Fost.* 353, 354; and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not, (*see the Sessinghurst-house case*, 1 *Hale*, 461), provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. 1 *Hawk.* c. 31, *s.* 52; *Fost.* 352; *R.* v. *Hodgson*, 1 *Leach*, 6: *R.* v. *Plummer*, *Kel.* 109. But the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R.* v. *White*, *R. & R.* 99. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground, took from him his gun, pocket-book, and money, *Park*, J., held, that this was robbery in Williams only. *R.* v. *Hawkins*, 3 *C. & P.* 392. The purpose must also be unlawful; for, if the original object be lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although

the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree. *Fost.* 354, 355; 2 *Hawk. c.* 29, *s.* 9.

A mere participation in the act, without a felonious participation in the design, will not be sufficient. 1 *East, P. C.* 258; *R* v. *Plummer, Kel.* 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 *Hale,* 446. So, on an indictment under the statute 1 *Vict. c.* 85, *s.* 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life, with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge as against B., that he should have been aware of A.'s intention to commit murder. *Reg.* v. *Cruse,* 8 *C. & P.* 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord *Hale* considers, that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree. 1 *Hale,* 422, 452. However, in a late case it was holden by *Patteson,* J., that all persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace; *R.* v. *Perkins,* 4 *C. & P.* 537: *see R.* v. *Murphy,* 6 *C. & P.* 103; and, upon the same principle the seconds in a duel, being participators in an unlawful act, would both be guilty of murder, if death were to ensue; and so the law was laid down in *Reg.* v. *Young,* 8 *C. & P.* 645, and in *Reg.* v. *Cuddy,* 1 *C. & K.* 210. If the principal were insane at the commission of the act, no person can be convcted as an aider and abettor of his act. *Reg.* v. *Tyler,* 8 *C. & P.* 616. (*See post,* p. 12). But where an insane person collected together a number of persons, who armed themselves with a common purpose of resisting the lawful authorities, and in their presence he shot a peace-officer who came to apprehend him under a warrant, it was held that they were guilty of murder as principals in the first degree; and that no apprehension of personal danger to themselves from him furnished any excuse to them for assisting in his illegal acts. *Id.*

Aiders and abettors were formerly defined to be accessaries at the fact, and could not have been tried until the principal had been convicted or outlawed. *Fost.* 347. But this doctrine is exploded; and it is now settled, that all those who are present aiding and abetting when a felony is committed, are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty; 2 *Hale,* 223; and may be convicted, though the party charged as principal in the first degree is acquitted. *R.* v. *Taylor,* 1 *Leach,* 360: *Benson* v. *Offley,* 2 *Show.* 510; 3 *Mod.* 121: *R.* v. *Wallis, Salk.* 334: *R.* v. *Towle, R. & R.* 314; 3 *Price,* 145; 2 *Marsh.* 465.

In treason, and offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, 2 *Hawk. c.* 25, *s.* 64, (*see Mackally's case,* 9 *Co.* 67 *b*), provided the offence

permit of a participation; *Fost.* 345; or specially as aiders and abettors; *Reg* v. *Crisham, C. & Mar.* 187. But where by particular statutes the punishment is different, then principals in the second degree must be indicted specially as aiders and abettors. 1 *East, P. C.* 348, 350: *R.* v. *Sterne,* 1 *Leach,* 473. If indicted as aiders and abettors, an indictment charging that A. gave the mortal blow, and that B., C., and D. were present, aiding and abetting, will be sustained by evidence that B. gave the blow, and that A., C., and D. were present, aiding and abetting; and even if it appear that the act was committed by a person not named in the indictment, the aiders and abettors may, nevertheless, be convicted. *R.* v. *Borthwick, Doug.* 207: 1 *East, P. C.* 350. Where a prisoner was convicted upon an indictment which charged him with a rape as a principal in the first count, and as an aider and abettor in the second, it was holden, that the conviction upon the first count was good. *R.* v. *Folkes,* 1 *Mood. C. C.* 354: *R.* v. *Gray,* 7 *C. & P.* 164. *See Reg.* v. *Crisham, supra.*

*Accessaries before the fact.*]—An accessary before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. 1 *Hale,* 615.

If the party be actually or constructively present when the felony is committed, he is, as we have seen, (*ante, p.* 4), an aider and abettor, and not an accessary before the fact; for it is essential, to constitute the offence of accessary, that the party should be absent at the time the offence is committed. 1 *Hale,* 615: *R.* v. *Gordon,* 1 *Leach,* 515; 1 *East, P. C.* 352.

The procurement may be personal, or through the intervention of a third person; *Fost.* 125: *R.* v. *Earl of Somerset,* 19 *St. Tr.* 804: *R.* v. *Cooper,* 5 *C. & P.* 535; it may also be direct, by hire, counsel, command, or conspiracy; or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony; 2 *Hawk. c.* 29, *s.* 16; but the bare concealment of a felony to be committed will not make the party concealing it an accessary before the fact; 2 *Hawk. c.* 29, *s.* 23; nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence. 1 *Hale,* 616. The procurement must be continuing; for if the procurer of a felony repent, and, before the felony is committed, actually countermand his order, and the principal, notwithstanding, commit the felony, the original contriver will not be an accessary. 1 *Hale,* 618. So, if the accessary order or advise one crime, and the principal intentionally commit another; as, for instance, to burn a house, and instead of that he commit a larceny; or, to commit a crime against A., and instead of so doing he commit the same crime against B.—the accessary will not be answerable; 1 *Hale,* 617; but, if the principal commit the same offence against B. by mistake, instead of A., it seems it would be otherwise. *Fost.* 370 *et seq.; but see* 1 *Hale,* 617; 3 *Inst.* 51. But it is clear that the accessary is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he dies, A. is accessary to the murder. 4 *Bl. Com.* 37; 1 *Hale,* 617. Or, if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessary to the burning of D.'s house. *R.* v. *Saunders, Plowd.* 475. So, if the offence commanded be effected, although by different means from those commanded; as, for instance, if J. W. hire J. S. to poison A.,

and, instead of poisoning, him, he shoot him, J. W. is, nevertheless, liable as accessary. *Fost.* 369, 370. Where the procurement is through an intermediate agent, it is not necessary that the accessary should name the person to be procured to do the act. *R.* v. *Cooper,* 5 *C. & P.* 535.

Several persons may be convicted on a joint charge against them as accessaries before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places. *Reg.* v. *Barber,* 1 *C. & K.* 442.

It may be necessary to observe, that it is only in felonies that there can be accessaries; in high treason, every instance of incitement, &c., which in felony would make a man an accessary before the fact, will make him a principal traitor; *Fost.* 341; and he must be indicted as such. 1 *Hale,* 235. Also, all those who in felony would be accessaries before the fact, in offences under felony are principals, and must be indicted as such. 4 *Bl. Com.* 36: *Reg.* v. *Clayton,* 1 *C. & K.* 128: *Reg.* v. *Moland,* 2 *Mood. C. C.* 276. In manslaughter, however, there can be no accessaries before the fact, for the offence is sudden and unpremeditated; and, therefore, if A. be indicted for murder, and B. as accessary, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale,* 347, 450, 616.

Formerly, an accessary could not, without his own consent, unless tried with the principal, be brought to trial until the guilt of his principal had been legally ascertained by conviction (1 *Anne, st.* 2, *c.* 9) or outlawry. *Fost.* 360; 1 *Hale,* 623. But now, accessaries before the fact to any felony, whether at common law or by statute made or to be made, shall be deemed guilty of felony, and may be indicted as accessaries before the fact with the principal, or after the conviction (7 *G.* 4, *c.* 64, *s.* 11) of the principal, or for a substantive felony, whether the principal shall or shall not have been convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as if convicted as accessaries to the felony. 7 *G.* 4, *c.* 64, *s.* 9. But this statute only applies where the accessary might at common law have been indicted with, or after the conviction of, the principal; and, therefore, where a defendant was indicted as an accessary before the fact to the murder of S. W., she having, by his procurement, killed herself, it was holden that the statute did not apply. *R.* v. *Russell,* 1 *Mood. C. C.* 356: *Reg.* v. *Leddington,* 9 *C. & P.* 79. Where the principal and accessary are tried together, (which is in general the best and most usual way), if the principal plead otherwise than the general issue, the accessary shall not be bound to answer, until the principal's plea be first determined. 9 *H.* 7, *c.* 19; 1 *Hale,* 624; 2 *Inst.* 184. So also, where the principal does not appear to take his trial, but the accessary does, the latter is not compellable to plead. *Reg.* v. *Ashmall,* 9 *C. & P.* 236. But if the general issue be pleaded, then the jury shall be charged to inquire first of the principal, and, if they find him not guilty, then to acquit the accessary. 1 *Hale,* 624; 2 *Inst.* 184. Where the principal was indicted for burglary and larceny in a dwelling-house, and the accessary was charged in the same indictment as accessary before the fact to the said "*felony and burglary,*" and the jury acquitted the principal of the burglary, but found him guilty of the larceny: it seems the judges were of opinion that the accessary should have been acquitted; for the indictment charged him as accessary to the burglary only, and the principal being acquitted of that, the accessary should have been acquitted also. *R.* v. *Donnelly and Vaughan, R. & R.* 310; 2

*Marsh.* 171. Where three persons were charged with a larceny, and two others as accessaries, in one count, and the latter were also charged separately in other counts with substantive felonies, it was held that, although the principals were acquitted, the accessaries might be convicted on the latter counts. *Reg.* v. *Pulham*, 9 *C. & P.* 281.

If a man be indicted as accessary in the same felony to several persons, and be found accessary to one, it is a good verdict, and judgment may be passed upon him. *R.* v. *Lord Sanchar*, 9 *Co.* 189; *Fost.* 361; 1 *Hale*, 624. But no person, who shall be once duly tried, whether as an accessary before the fact, or as for a substantive felony, or for any offence of being accessary, shall be liable to be again indicted or tried for the same offence. 7 *G.* 4, *c.* 64, *s.* 9.

*Accessaries after the fact.*]—An accessary after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. 1 *Hale*, 618; 4 *Bl. Com.* 37; 2 *Hawk. c.* 29, *s.* 1; 3 *P. Wms.* 475. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessary after the fact; as, for instance, that he concealed him in the house; *Dalt.* 530, 531; or shut the door against his pursuers, until he should have an opportunity of escaping; 1 *Hale*, 619; or took money from him to allow him to escape; 9 *H.* 4, 1; or supplied him with money, a horse, or other necessaries, in order to enable him to escape; *Hale's Sum.* 218; 2 *Hawk. c.* 29, *s.* 26; or that the principal was in prison, and J. W. bribed the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape. 1 *Hale*, 621.

But merely suffering the principal to escape will not make the party an accessary after the fact; for it amounts at most but to a mere omission. 9 *H.* 4, 1; 1 *Hale*, 619. So, if a person supply a felon in prison with victuals or other necessaries for his sustenance; 1 *Hale*, 620; or relieve and maintain him if he be bailed out of prison; *Id.*; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon; 1 *Hale*, 332; or if a person speak or write in order to obtain a felon's pardon or deliverance; 26 *Ass.* 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 *Inst.* 139; 1 *Hale*, 620; or even if he himself agree, for money, not to give evidence against the felon, *Moor*, 8, or know of the felony and do not discover it; 1 *Hale*, 371, 618: none of these acts would be sufficient to make the party an accessary after the fact. He must be proved to have done some act to assist the felon personally. *See Reg.* v. *Chapple*, 9 *C. & P.* 355. But if he employ another person to do so, he will be equally guilty as if he harboured or relieved him himself. *R.* v. *Jarvis*, 2 *M. & Rob.* 40.

A wife is not punishable as accessary for receiving, &c. her husband, although she know him to have committed felony; 1 *Hale*, 48, 621; for she is presumed to act under his coercion. But no other relation of persons can excuse the wilful receipt or assistance of felons: a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. *Id.* Even one may make himself an accessary after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring the thief, or assisting in his escape. *Fost.* 123; *Cromp.* 41 *b*, *pl.* 4 & 5. If the wife alone, the husband being ignorant of it,

receive any other person being a felon, the wife is accessary, and not the husband. 1 *Hale*, 621. And if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. *Id.*

To constitute this offence, it is necessary that the accessary have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony. 2 *Hawk. c.* 29, *s.* 32. It is also necessary that the felony be complete at the time the assistance is given; for, if one wound another mortally, and, after the wound given, but before death ensues, a person assist or receive the delinquent, this does not make him accessary to the homicide; for until death ensues no felony is committed. 2 *Hawk. c.* 29, *s.* 35; 4 *Bl. Com.* 38.

In high treason there are no accessaries after the fact, those who in felony would be accessaries after the fact being principals in high treason (*ante, p.* 8); yet in their progress to conviction, they must be treated as accessaries, and indicted specially for the receipt, &c., and not as principal traitors. 1 *Hale*, 238. So, in offences under felony, there are no accessaries after the fact; 1 *Hale*, 613; although, if the act of the receiver amount to a rescue, or to obstructing an officer of justice in the execution of his duty, or the like, he would undoubtedly be indictable for it as for a misdemeanor. 2 *Hawk. c.* 29, *s.* 4. Accessaries after the fact cannot be tried before the conviction (7 *G.* 4, *c.* 64, *s.* 11) of their principal, unless they consent to it. 1 *Hale*, 623; 2 *Hawk. c.* 29, *s.* 45. But they may be tried with their principal; 1 *Hale*, 623; or separately, after the principal has been convicted; and, having been once duly tried, they cannot be again indicted or tried for the same offence. 7 *G.* 4, *c.* 64, *s.* 10.

The receipt of stolen goods did not at common law constitute the receiver an accessary, but was a distinct misdemeanor, punishable by fine and imprisonment; 1 *Hale*, 620; and although, by several statutes, receivers were made accessaries after the fact, and, by the stat. 7 & 8 *G.* 4, *c.* 29, *ss.* 54, 55, 60, may in certain cases be indicted either as accessaries after the fact to felony, or for a substantive felony, or may be prosecuted for a misdemeanor, or punished upon summary conviction; yet the receipt of stolen goods is still a distinct and separate offence, and as such will be considered hereafter.

*Infants.*]—It is a general rule, that infants under the age of discretion, are not punishable by any criminal prosecution whatever; *Mirr. c.* 4. *s.* 16; 1 *Hale*, 27; 1 *Hawk. c.* 1, *s.* 1; but the age of discretion, by the law of England, varies according to the nature of the offence.

Within the age of seven years no infant can be guilty of felony, or be punished for any capital offence; for, within that age, an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion; against which presumption no averment shall be received. *Reg.* 309, *b;* 1 *Hale*, 27, 28; 4 *Bl. Com.* 23; *Mirr. c.* 4, *s.* 6; *Plowd.* 19; *Fost.* 349; *Cowp.* 222, 223. But the incapacity of infants to do evil and contract guilt ceases upon their attaining the age of fourteen years, at which age they are presumed by the law to be *doli capaces*, and capable of discerning good from evil, and are, with respect to their criminal actions, subject to the same rule of construction as others of more mature age. 1 *Hale*, 25; *Doct. & St. c.* 26; *Co. Litt.* 79, 171, 247; *Dalt.* 476, 505; 1 *Hawk. c.* 1, *n.* (1). Be-

tween the age of seven and fourteen years an infant shall be deemed *primâ facie* to be *doli incapax*, but *malitia supplet ætatem*, and this presumption may be rebutted by strong and pregnant evidence of a mischievous discretion; for the capacity to do evil and contract guilt is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. 4 *Bl. Com.* 23; 1 *Hale*, 25, 27. Thus, it is said that an infant eight years of age may be indicted for murder, and shall be hanged for it; *Dalt. Just. c.* 147; and an infant between the age of eight and nine years was executed for arson, it appearing that he was actuated by malice and revenge, and had perpetrated the offence with craft and cunning. 1 *Hale*, 25. So, a girl of thirteen was burnt for killing her mistress; 1 *Hale*, 26; and, where an infant, nine years of age, killed an infant of the like age, and confessed the felony, it appearing upon examination that he had hid both the blood and the body, the justices were of opinion that he might lawfully be hanged, but respited the judgment that he might be pardoned. *Fitz. Cor.* 57. *See R.* v. *York*, *Fost.* 70; 4 *Bl. Com.* 24: *R.* v. *William Wild*, 1 *Mood. C. C.* 452. But in cases of this nature the evidence of a mischievous discretion, to rebut the *primâ facie* presumption of law arising from nonage, should be clear and strong beyond all doubt and contradiction. 4 *Bl. Com.* 23; 1 *Hale*, 25, 27. Where a child between the age of seven and fourteen years is indicted for felony, two questions are to be left to the jury: first, whether he committed the offence; and, secondly, whether at the time he had a guilty knowledge that he was doing wrong. *R.* v. *Owen*, 4 *C. & P.* 236. An infant under fourteen is presumed by law to be unable to commit a rape, and therefore cannot be found guilty of it; for though in other felonies *malitia supplet ætatem*, yet, as to this particular act, the law presumes him impotent, as well as wanting in discretion. And this presumption is not affected by the stat. 9 *G.* 4, *c.* 31, *ss.* 16, 17, which makes the offence complete without evidence of emission; *R.* v *Groombridge*, 7 *C. & P.* 582; nor is any evidence admissible to shew that in fact he had arrived at the full state of puberty, and could commit the offence. *Reg.* v. *Philips*, 8 *C. & P.* 736: *Reg.* v. *Jordan*, 9 *C. & P.* 118: *Reg.* v. *Brimilow*, *Id.* 366; 2 *Mood. C. C.* 122. But he may be a principal in the second degree, if he aid and assist in the commission of the offence, and it appear that he had a mischievous discretion; for the excuse of impotency will not in such case apply. 1 *Hale*, 630; *R.* v. *Eldershaw*, 3 *C. & P.* 396.

In some misdemeanors and offences that are not capital, an infant is privileged, by reason of his nonage, if under twenty-one; for instance, if the offence charged by the indictment be a mere nonfeasance (unless it be such a thing as he is bound to do by reason of his tenure, or the like, as to repair a bridge, &c.; *see R.* v. *Sutton*, 3 *Ad. & E.* 597; 5 *W. & M.* 353); then, in some cases he shall be privileged, if under twenty-one, because laches shall not be imputed to him. *Co. Litt.* 357; 4 *Bl. Com.* 22. But if he be indicted for any notorious breach of the peace, as riot, battery, or for perjury, or cheating, or the like, he is equally liable as a person of full age; because, upon his trial, the court, *ex officio*, ought to consider whether he was *doli capax*, and had discretion to do the act with which he is charged. 1 *Hale*, 20, 21; 4 *Bl. Com.* 22; 3 *Bac. Abr. Infancy*, (*H*).

*Persons non compotes mentis.*]—Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions. But if there be an incapacity, or

defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. This species of non-volition is either natural, accidental, or affected: it is either perpetual or temporary; and may be reduced to three general heads: 1. *A nativitate, vel dementia naturalis;* 2. *Dementia accidentalis vel adventitia;* 3. *Dementia affectata.*

1. Of the first, or *dementia naturalis*, is idiocy or natural fatuity. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; *Co. Litt.* 247; and those are said to be idiots who cannot number twenty, tell the days of the week, who do not know their fathers or mothers, or the like: but these instances are mentioned as tests of sanity only, and are not always conclusive; and, although idiocy or natural fatuity is in general sufficiently apparent, the question, whether idiot or not, is a question of fact triable by the jury, *Bac. Abr., Idiot, (A)*; *Bro. Abr., Idiot*, 4, and ought to be clearly made out, in order to exempt the party from punishment. *Rex* v. *Arnold*, 1 *Russ.* 9. One deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law, as applicable to particular offences, is by presumption of law an idiot; but if it can be shewn that he has the use of understanding, which many of that condition discover by signs, then he may be tried, and suffer judgment and execution, although great caution should be observed in such proceedings. 1 *Hale*, 34. *See R.* v. *Jones*, 1 *Leach*, 102: *R.* v. *Steel, Id.* 451; *Dy.* 25; *Moor*, 4, *pl.* 12; *F. N. B.* 233: *R.* v. *Esther Dyson, cor. Parke, J., York Spr. Ass.* 1831; *Matthews's Dig.* 410.

2. Adventitious insanity, or *dementia accidentalis*, proceeds from various causes, and is of several kinds or degrees: it is either partial, (an insanity upon some one subject, the party being sane upon all others), or total; permanent, (usually called madness), or temporary, (the object of it being afflicted with his disorder at certain periods and vicissitudes only, with lucid intervals), which is usually denominated lunacy. 3 *Bac. Abr.* 86.

3. The vice of drunkenness, which produces a perfect though temporary frenzy or insanity, usually denominated *dementia affectata*, or acquired madness, will not excuse the commission of any crime; and an offender under the influence of intoxication can derive no privilege from a madness voluntarily contracted, but is answerable to the law equally as if he had been in the full possession of his faculties at the time; 1 *Hale*, 32; *Co. Litt.* 247; 1 *Hawk. c.* 1, *s.* 6; although it has been said, that, upon an indictment for murder, the intoxication of the defendant may be taken into consideration, as a circumstance to shew that the act was not premeditated. *R.* v. *Grindley*, 1 *Russ.* 8: *R.* v. *Thomas*, 7 *C. & P.* 817: *R.* v. *Meakin, Id.* 297: *but see R.* v. *Carroll, Id.* 145. But, if the primary cause of the frenzy be involuntary, or it have become habitual and confirmed, this species of insanity will excuse the offender equally as the former descriptions of this malady. Thus, for instance, if a man, through the unskilfulness of his physician, or the contrivance of his enemies, take that which produces a temporary frenzy, he will not, whilst under the influence of the frenzy, be accountable for his actions. So, neither will he be liable to be punished for any crime perpetrated under the influence of insanity which is habitual and fixed, though caused by frequent intoxication, and originally contracted by his own act. 1 *Hale*, 32.

We come now to consider the effect of these different kinds of insanity. Where the deprivation of the understanding and memory is total, fixed, and permanent, it excuses all acts; so, likewise, a man labouring under adventitious insanity is, during the frenzy, entitled to the same indulgence, in the same degree with one whose disorder is fixed and permanent. *Beverley's case,* 4 *Co.* 125; *Co. Litt.* 247; 1 *Hale,* 31. But the difficulty in these cases is, to distinguish between a total aberration of intellect and a partial or temporary delusion merely, notwithstanding which the patient may be capable of discerning right from wrong; in which case he will be guilty in the eye of the law, and amenable to punishment. Partial insanity, says Lord *Hale,* is the condition of many, especially of melancholy persons, who generally discover their defects in excessive fear and grief, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the commission of any crime. 1 *Hale,* 30. Doubtless, he adds, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences, it is very difficult to define the invisible line that divides perfect from partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and the jury, lest, on the one side, there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes. He concludes by suggesting, as the best measure, that such a person as, labouring under melancholy distempers, hath yet as great understanding as ordinarily a child of fourteen years hath, is such a person as can be guilty of treason and felony. 1 *Hale,* 30, 412. Upon this subject many cases have been decided, from which it is difficult to extract any precise or definite rule. *See R.* v. *Ld. Ferrers,* 19 *St. Tr.* 333: *R.* v. *Arnold,* 16 *St. Tr.* 764: *R.* v. *Parker, Coll.* 477: *R.* v. *Bowler, Id.* 673: *R.* v. *Bellingham, Id.* 636, *Add.*: *R.* v. *Hadfield, Id.* 580: *Reg.* v. *Oxford,* 9 *C. & P.* 525. It seems clear, however, that to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. *See R.* v. *Offord,* 5 *C. & P.* 168. If there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil—then he will be responsible for his actions. 1 *Russ.* 12; *Reg.* v. *M'Naughten,* 10 *Cl. & Fin.* 200; 1 *C. & K.* 130, *n.*: *Reg.* v. *Higginson,* 1 *C. & K.* 129. Whether the prisoner were sane or insane at the time the act was committed, is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the party. Upon a question of insanity, a witness of medical skill may be asked whether such and such appearances proved by other witnesses are, in his judgment, symptoms of insanity; but it has always been considered as very doubtful whether he can be asked, whether from the testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity; for that is the point to be decided by the jury. *R.* v. *Right, R. & R.* 456: *see also R.* v. *Searle,* 1 *M. & Rob.* 75.

The above-cited case of *Reg.* v. *M'Naughten* gave rise to a discussion on this subject in the House of Lords, and the following questions were propounded to the judges, in relation to the law re-

specting alleged crimes committed by persons afflicted with insane delusion:—

"1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?

"2nd. What are the proper questions to be submitted to the jury, when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, (murder, for example), and insanity is set up as a defence?

"3rd. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

"4th. If a person, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused?

"5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under and what delusion at the time?"

To these questions the judges (with the exception of *Maule*, J., who gave on his own account a more qualified answer) answered as follows:—

To the first question:—"Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land."

To the 2nd and 3rd questions:—"That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when

put to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstance of each particular case may require."

To the fourth question:—"The answer to this question must of course depend on the nature of the delusion; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, be would be liable to punishment."

And to the last question:—"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

It may be useful to observe, that, if upon the trial of any person for *treason*, *murder*, or *felony*, *R.* v. *Little*, *R.* & *R.* 430, his insanity at the *time of the commission of the offence* is given in evidence, and the jury acquit him, the jury must be required to find specially whether he was insane at the time of the *commission* of the offence, and declare whether he was acquitted on account of such insanity: and if the jury find that he was insane at the time of the commission of the offence, the court before whom the trial takes place must order him to be kept in strict custody, in such manner as to the court shall seem fit, until the Queen's pleasure be known; and the Queen may order the confinement of such person during pleasure. 39 & 40 *G.* 3, *c.* 94, *s.* 1. By the 3 & 4 *Vict.* *c.* 54, *s.* 3, the same provisions are extended to persons charged with *misdemeanors*. And if any person indicted for any offence is insane, and upon arraignment is found so to be by a jury lawfully impanelled for that purpose, (that is, by a jury returned by the sheriff *instanter*, in the nature of an inquest of office), so that he cannot be tried upon such indictment; or if, upon the trial of any person so indicted, he

appear to the jury charged on the indictment to be insane, the court may order that finding to be recorded, and that he be kept in custody till her Majesty's pleasure be known: so, likewise, if any person charged with any offence be brought up to be discharged for want of prosecution, and appear to be insane, the court may order a jury to be impanelled to try the sanity of such person, and, if the jury find him to be insane, may order him to be kept in strict custody, in like manner, until her Majesty's pleasure be known. 39 & 40 *G.* 3, *c.* 94, *s.* 2. *See R.* v. *Pritchard*, 7 *C.* & *P.* 303: *Reg.* v. *Goode*, 7 *Ad.* & *Ell.* 536. And any person under sentence of imprisonment or transportation, who may become insane, may be removed to the county asylum or other receptacle for insane persons, by order of the Secretary of State, upon a certificate of two surgeons or physicians, there to remain until it shall be certified to the Secretary of State that such person has become of sound mind, whereupon he may be discharged by order of the Secretary of State, or removed to the prison if still liable to be continued in custody. 9 *G.* 4, *c.* 40, *s.* 55. *See* 3 & 4 *Vict. c.* 54.

A grand jury have no authority by law to ignore a bill upon the ground of insanity; it is their duty to find the bill, and then the court, either on arraignment or trial, may order the detention of the prisoner during the pleasure of the Crown. *Reg.* v. *Hodges*, 8 *C.* & *P.* 195.

*Persons in subjection to the power of others.*]—The same sound principle which excuses those who have no mental will in the perpetration of an offence, protects from the punishment of the law those who commit crimes in subjection to the power of others, and not as the result of an uncontrolled free action proceeding from themselves. 4 *Bl. Com.* 27; 1 *Hale*, 43. Thus, if A., by force, take the hand of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but B. is excused; but if merely a moral force be used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. 1 *Hale*, 434; 1 *East*, *P. C.* 225. (*See ante*, *p.* 6). This protection also exists in the public and private relations of society: public, as between subject and prince, obedience to existing laws being a sufficient extenuation of civil guilt before a municipal tribunal; and private, proceeding from the matrimonial subjection of the wife to the husband, from which the law presumes a coercion, which, in many cases, excuses the wife from the consequence of criminal misconduct. The private relations which exist between parent and child, and master and servant, will not, however, excuse or extenuate the commission of any crime, of whatever denomination; for the command is void in law, and can protect neither the commander nor the instrument. 1 *Hale*, 44, 516.

In general, if a felony be committed by a *feme covert* in the presence of her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment; 1 *Hale*, 45, 516; 1 *Hawk. c.* 1, *s.* 9; thus, a woman who went from shop to shop uttering base coin, her husband accompanying her each time to the door, but not going in, was holden by *Bayley*, J., to be under her husband's coercion; *MS. Durham Spring Ass.* 1829; *Matthews's Dig.* 262; but if, in the absence of her husband, she commit an offence, even by his order or procurement, her coverture will be no excuse; 2 *Leach*, *C. C.* 1102; 2 *East*, *P. C.* 559; *R.* v. *Morris*,

*R.* & *R.* 27: 1 *Hawk. c.* 1, *s.* 11; even though he appear at the very moment after the commission of the offence; and no subsequent act of his, though it may render him an accessary to the felony of his wife, can be referred to what was done by his wife in his absence. *R.* v. *Hughes*, 1 *Russ.* 18. This presumption, however, may be rebutted by evidence; and if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily, and not by constraint of her husband, although he was present and concurred, she will be guilty and liable to punishment. 1 *Hale*, 516. Thus, a married woman, who swore falsely that she was next of kin to a person dying intestate, and so procured administration to the effects, was held responsible for the offence, though her husband was with her when she took the oath. *R.* v. *Dicks*, 1 *Russ.* 16. So, where a husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was held to be punishable. *R.* v. *Hammond*, 1 *Leach*, 447. Where stolen goods are received by a married woman in the absence of her husband, and are concealed in his house without his knowledge, she alone may be indicted and punished for the offence; but if the husband's ignorance of the transaction be not satisfactorily proved, the law will, in most cases, impute the receiving to him. *Dalt, c.* 157, *p.* 353. Where husband and wife were convicted jointly of receiving stolen goods, it was holden, that the conviction of the wife could not be supported, though she had been more active than her husband, because it had not been left to the jury to say whether she received the goods in the absence of her husband. *R.* v. *Archer*, 1 *Mood. C. C.* 143. This protection is not allowed in crimes which are *mala in se*, and prohibited by the law of nature, nor in such as are heinous in their character, or dangerous in their consequences; and, therefore, if a married woman be guilty of treason, murder, or offences of the like description, in company with and by coercion of her husband, she is punishable equally as if she were sole. 1 *Hale*, 45, 47, 48; 1 *Hawk. c.* 1, *s.* 11; 4 *Bl. Com.* 29; 1 *St. Tr.* 28. *See Reg.* v. *Cruse*, 8 *C.* & *P.* 541; 2 *Mood. C. C.* 53. So, a married woman may be indicted jointly with her husband for keeping a bawdy-house, *R.* v. *Williams*, 10 *Mod.* 63; 1 *Salk.* 384, or gaming-house, *R.* v. *Dixon*, 10 *Mod.* 335; for these are offences connected with the government of the house, in which the wife has a principal share. 1 *Hawk. c.* 1, *s.* 12. So, they may be jointly convicted of an assault. *Reg.* v. *Cruse, supra.* And, according to the prevailing opinion, it seems that the wife may be found guilty with the husband in all misdemeanors. *See R.* v. *Ingram*, 1 *Salk.* 384; 4 *Bl. Com., by Ryland*, 29, *n.* (10). In a recent case, *R.* v. *Price*, 8 *C.* & *P.* 19, the Common Serjeant, after consulting *Bosanquet* and *Coltman*, JJ., doubted this distinction, and directed the acquittal of a woman who was indicted with her husband for a misdemeanor in uttering counterfeit coin. (*See ante, p.* 16). Husband and wife cannot alone be found guilty of a conspiracy, for they are considered in law as one person, and are presumed to have but one will. 1 *Hawk. c.* 72, *s.* 8.

If a married woman incite her husband to the commission of a felony, she is an accessary before the fact; 1 *Hale*, 516; 2 *Hawk. c.* 29, *s.* 34; but she cannot be treated as an accessary for receiving her husband, knowing that he has committed a felony; 1 *Hale*, 47; nor for concealing a felon jointly with her husband. *Id.*; 1 *Hawk. c.* 1, *s.* 10. And she will not be answerable for her husband's breach of duty, however fatal, though she be privy to his misconduct, if no

duty be cast upon her, and she be merely passive. *R.* v. *Squires*, 1 *Russ.* 16.

If a married woman, indicted jointly with her husband, be described in the indictment as his wife, she need not prove her marriage, but will be entitled to protection if it appear that she acted under his coercion: but the mere description will be no ground for dismissing the indictment as to the wife, for the indictment is joint and several, according to the facts as they may appear. 1 *Hale*, 46. If she be described as a single woman, she must prove her marriage; *R.* v. *Jones*, *Kel.* 37; and such evidence must be given as will satisfy the jury of her marriage, although it is not absolutely necessary that the actual marriage should be proved. *R.* v. *Atkinson*, 1 *Russ.* 20: *R.* v. *Hassall*, 2 *C. & P.* 434: *Reg.* v. *Woodward*, 8 *C. & P.* 561.

*Ignorance.*]—Ignorance of the law will not excuse from the consequences of guilt any person who has capacity to understand the law, of which all are presumed to have knowledge. 1 *Hale*, 42. But this rule supposes an opportunity of knowing the law. Where, therefore, a defendant was indicted for maliciously shooting at A. B. upon the high seas, and the offence was perpetrated within a few weeks after the stat. 39 *G.* 3, *c.* 37 passed, and before notice of it could have reached the place where the offence was committed, the judges held that he could not have been tried before that act passed; and that, as he could not have heard of it, he ought to be pardoned. *R.* v. *Bailey*, *R. & R.* 1. If, however, the offence be committed in England, a foreigner cannot be excused, because he does not know the law. *R.* v. *Esop*, 7 *C. & P.* 456. But ignorance or mistake of the fact may in some cases be allowed as an excuse for the inadvertent commission of a crime; as, for instance, if a man, intending to kill a thief in his own house, kill one of his own family, he will be guilty of no offence. 1 *Hale*, 42, 43; 4 *Bl. Com.* 27; *R.* v. *Levett*, *Cro. Car.* 538. But this rule proceeds upon a supposition, that the original intention was lawful; for, if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong and mischievous, the actor is criminally responsible for whatever consequence may ensue. 4 *Bl. Com.* 27.

## Sect. 3.

### THE FORM OF AN INDICTMENT.

An indictment consists of three parts: the commencement, the statement, and the conclusion. We shall treat of each of these in its order.

### 1. *The Commencement.*

The commencement of every indictment is thus:—"*Middlesex to wit:—The jurors for our lady the Queen upon their oath present, that,*" *&c.* [so proceeding to state the offence for which the defendant is to be prosecuted].

*Venue.*]—The venue in the margin is the only part of the commencement of an indictment that requires attention. The general rule upon this subject is, that the venue in the margin should be the county in which the offence was committed; *see* 2 *Hale*, 160; or, if the jurisdiction of the court in which the bill of indictment is

to be preferred extend only to part of the county, or, as is the case with the Central Criminal Court, includes more than one county, 4 & 5 *W*. 4, *c*. 36, or be confined within the limits of a borough, (as to which *see* 5 & 6 *W*. 4, *c*. 76; *R*. v. *Piller*, 7 *C*. & *P*. 337, *and R*. v. *JJ*. *of Gloucestershire*, 4 *A*. & *E*. 689), the venue in the margin should be co-extensive with the jurisdiction of the court; that is, it should be descriptive of the limit to which the jurisdiction of the court is confined, and the offence must have been committed within the limit so described. This is the general rule of the common law; but several exceptions have been made to it by statute.

1. In indictments for extortion, the venue, it is said, may be laid in any county. 31 *Eliz*. *c*. 5, *s*. 4; 1 *Hawk*. *c*. 68; *s*. 6, *n*. (3); 2 *Stark*. *C*. *P*. 585, *n*. (*k*). *Sed quære*, 2 *Hawk*. *c*. 26, *s*. 50; 2 *Chitt*. *C*. *L*. 294, (*n*).

2. In indictments for plundering or stealing any part of any ship in distress or wrecked, or any goods belonging to such ship, the venue may be laid either in the county in which the offence was committed, or in the next adjoining county. 7 & 8 *G*. 4, *c*. 29, *s*. 18. It is doubtful, however, whether this provision is not repealed by stat. 7 *W*. 4 & 1 *Vict*. *c*. 87, *s*. 1, although that statute recites a part of 7 & 8 *G*. 4, *c*. 29, *s*. 18, and does not notice the above provision.

3. In indictments for resisting or assaulting officers of the excise, 7 & 8 *G*. 4, *c*. 53, *s*. 43, or for offences against the revenue of the customs, 3 & 4 *W*. 4, *c*. 53, *s*. 122, the venue may be laid in any county. *See* 9 *G*. 2, *c*. 35, *s*. 36. For offences against the customs, committed upon the high seas, the venue may be laid in the county into which the offender is taken, and, if he be taken to a city or borough, &c., in the county in which such city, &c. is situate. 3 & 4 *W*. 4, *c*. 53, *s*. 77. *See R*. v. *Cartwright*, 4 *T*. *R*. 490: *In re Nunn*, 8 *B*. & *C*. 644; 3 *Man*. & *R*. 75.

4. In indictments for offences relating to the post-office, the venue may be laid in the county or place where the offence is committed, or where the offender is apprehended or is in custody; and, if the offence be committed in or upon, or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post-letter-bag, or post letter, or in respect of a post-letter-bag, or post-letter, or a chattel, or money, or valuable security sent by the post, the venue may be laid in the county where the offender is apprehended or is in custody, or in any county or place through any part whereof the mail, or the person, or the post-letter-bag, or the post-letter, or the chattel, or the money, or the valuable security sent by the post, in respect of which the offence is committed, shall have passed in the due course of conveyance or delivery by post: and, if the side, centre, or other part of a highway, or the side, centre, bank, or other part of a river, canal or navigation, constitute the boundary of two counties, the venue may be laid in either county. 7 *W*. 4 & 1 *Vict*. *c*. 36, *s*. 37.

5. In indictments for endeavouring to seduce soldiers or sailors from their duty, or for inciting or stirring them up to mutiny, the venue may be laid in any county, whether the offence be committed on the high seas or in England. 37 *G*. 3, *c*. 70, *s*. 2; 57 *G*. 3, *c*. 7.

6. In indictments for forgery, and uttering forged instruments, the venue may be laid, and the offences charged to have been committed, in the county in which the offender is apprehended or is in custody; 1 *W*. 4, *c*. 66, *s*. 24; *R*. v. *James*, 7 *C*. & *P*. 558, or in which the offence was committed. *See R*. v. *Collicot*, *R*. & *R*. 212. And acces-

saries before and after the fact in felony, and aiders and abettors in misdemeanors, under that act, may be indicted, and the offence charged to have been committed, in any county in which the principal offender may be tried. 1 *W.* 4, *c.* 66, *s.* 24.

7. In indictments for offences against statutes relating to the stamp duties, the venue may be laid either in the county where the offence was committed, or in the county in which the parties accused, or any of them, shall have been apprehended. 53 *G.* 3, *c.* 108, *s.* 24.

8. In indictments for offences with reference to the coin of the realm, where two or more persons have acted in concert in different counties or jurisdictions, the venue may be laid, and the offence charged to have been committed, in any one of those counties or jurisdictions. 2 *W.* 4, *c.* 34, *s.* 15.

9. In indictments for bigamy, the venue may be laid either in the county where the offender was apprehended or is in custody, 9 *G.* 4, *c.* 31, *s.* 22, or in the county in which the second marriage took place. Where the indictment is preferred in the county in which the defendant was apprehended or is in custody, it must state that fact. *R.* v. *Frazer*, 1 *Mood. C. C.* 407 : *Reg.* v. *Whiley*, 2 *Mood. C. C.* 186. If the defendant, being in custody for a felony, be detained for bigamy, he may be indicted for the bigamy in the county in which he is so detained. *R.* v. *Gordon*, *R.* & *R.* 48.

10. In indictments for escapes, breaches of prison, and rescues, the venue may be laid either in the jurisdiction where the offence was committed, or in that where the offender shall be apprehended and retaken. 4 *G.* 4, *c.* 64, *s.* 44.

11. In indictments for returning from transportation, the venue may be laid either in the county where the defendant was apprehended, or in that from whence he was ordered to be transported. 5 *G.* 4, c. 84, *s.* 22.

12. In indictments against persons in the public service for embezzlement, the venue may be laid in the county or place where the party is apprehended, or in which the offence is committed. 2 *W.* 4, *c.* 4. *s.* 5.

13. In indictments for felonies or other offences committed in Wales, the venue might formerly have been laid in the next adjacent English county, 26 *H.* 8, *c.* 6, *s.* 6, which extended to felonies subsequently created. *R.* v. *Wyndham*, *R.* & *R.* 197 ; 3 *Camp.* 78 ; 34 & 35 *H.* 8, *c.* 26, *s.* 84. But now these statutes are repealed by implication by stat. 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 14 ; and in indictments for offences committed in Wales, the venue must, as in England, be laid in the county in which the offence is committed, unless otherwise provided for by statute.

14. Where an offence is committed within the county of a city or town corporate, (except in London, Westminster, or the borough of Southwark, 38 *G.* 3, *c.* 52, *s.* 11, so much of that statute as applied to the cities of Bristol, Chester, and Exeter, having been repealed by stat. 5 & 6 *W.* 4, *c.* 76, *s.* 109 ; *see Reg.* v. *Holden*, 8 *C.* & *P.* 606), the prosecutor may prefer his indictment to the jury of the next adjoining county, at the sessions of oyer and terminer or gaol delivery, and have the offender tried there ; 38 *G.* 3, *c.* 52, *s.* 2 : *see R.* v. *Gough*, 2 *Doug.* 791 ; but the venue must still be laid in the county of the city, &c. where the offence was committed ; *R.* v. *Mellor*, *R.* & *R.* 144 ; and it is not necessary to allege that the county in which the indictment is preferred is the county next adjoining to the county of the city, &c., but when the record is made up, that may appear in

the caption or memorandum. *R.* v. *Goff, R. & R.* 179. Or, if the bill have been found by a jury of the county of the city, &c., any court of oyer and terminer or gaol delivery, holden for such county of the city, &c., may order it to be tried by a jury of the next adjoining county, 38 *G.* 3, *c.* 52, *s.* 2. In both of which cases, the court before which the offender is tried and convicted may order the judgment to be executed, either in the same county, or in the county of a city in which the offence was committed; 51 *G.* 3, *c.* 100, *s.* 1; and may order the expenses of prosecution and witnesses, 38 *G.* 3, *c.* 52, *s.* 8, and the expenses the county have been put to by the removal of the prisoner there for trial, &c., 51 *G.* 3, *c.* 100, *s.* 2, to be paid by the person (the treasurer) who would have been ordered to pay the same, if the offender had been indicted and tried in such county of a city, &c. *See* 60 *G.* 3, *c.* 14, *s.* 3; 7 *G.* 4, *c.* 64, *s.* 25; 5 & 6 *Will.* 4, *c.* 76, *s.* 113; 5 & 6 *Vict. c.* 38.

15. In indictments for high treason or misprision of treason committed out of the realm, the venue may be laid in Middlesex, if the trial is to be in the Court of Queen's Bench; or in such shire as the Queen shall appoint, if she appoint a commission to try the offender. 26 *H.* 8, *c.* 13; 35 *H.* 8, *c.* 2, *s.* 1. *See* 5 & 6 *Ed.* 6, *c.* 11, *s.* 6, *and* 33 *H.* 8, *c.* 23. Treasons committed in Ireland or Scotland, since the Unions, and treasons committed in Wales, are not within the meaning of this act; but treasons committed in the isles of Man, Guernsey, Jersey, Sark, and Alderney, or in our foreign plantations, (which, although parts of the dominions of the Crown of England, are not parts of the realm, *see* 3 *Inst.* 11, 111; 4 *Inst.* 124), are. So, in indictments for murder or manslaughter, or for being accessary before the fact to murder, or after the fact to murder or manslaughter, committed on land out of the United Kingdom, by British subjects, whether within the Queen's dominions or without, the venue may be laid in the county appointed by the Lord Chancellor in the commission issued for the trial of the offenders. 9 *G.* 4, *c.* 31, *s.* 7. But this statute only relates to offences committed by the Queen's subjects, and does not extend to offences committed by foreigners, notwithstanding they are committed on Englishmen and on board an English ship; *R.* v. *Depardo*, 1 *Taunt*, 26; *R. & R.* 134: *R.* v. *Helsham*, 4 *C. & P.* 394: *R.* v. *Manoel de Mattos*, 7 *C. & P.* 458; but it comprehends all countries, though within the dominion of a foreign power. *R.* v. *Sawyer, R. & R.* 294. So, in indictments for burning or destroying the Queen's ships, magazines, &c., out of the realm, the venue may be laid in any county within the realm. 12 *G.* 3, *c.* 24, *s.* 2. So, in indictments for robberies and other capital crimes committed in Newfoundland, the venue may be laid in any county in England. 10 & 11 *W.* 3, *c.* 25, *s.* 13. In indictments for offences committed out of this kingdom against the foreign enlistment act, the venue may be laid at Westminster. 59 *G.* 3, *c.* 69, *s.* 9. Misdemeanors committed in India may be tried in the Queen's Bench in England. 13 *G.* 3, *c.* 63. And in indictments for offences committed by persons employed in any public service abroad, the venue may be laid in Middlesex. 42 *G.* 3, *c.* 85, *s.* 1. *See R.* v. *Shawe*, 5 *M. & Selw.* 403.

16. All offences alleged to have been committed on the high seas, and other places within the Admiralty of England, may be inquired of, heard, and determined by her Majesty's justices of assize or others her Majesty's commissioners by whom any court shall be holden under any of her Majesty's commissions of oyer and terminer or general

gaol delivery, and they shall have severally and jointly all the powers which by any act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the Admiralty of England, and may deliver the gaol, in every county and franchise within the limits of their several commissions, of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas, &c.: and all indictments found, and trials and other proceedings had, by and before the said justices and commissioners, shall be valid; and the court is empowered to order the payment of the costs and expenses of the prosecution of such offences, in the manner prescribed by the 7 *G.* 4, *c.* 64, *s.* 27. 7 *&* 8 *Vict. c.* 2. *s.* 1. And by sect. 2, in all indictments preferred before the said justices and commissioners under that act, the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts which, in other indictments, would be averred to have taken place in the county where the trial is had, shall, in indictments preferred and tried under that act, be averred to have taken place "on the high seas." Sect. 3 provides for the commitment for trial of persons charged with such offences; and sect. 4 provides, that nothing in the act contained shall affect the jurisdiction belonging to the Central Criminal Court for the trial of persons charged with offences committed on the high seas and other places within the Admiralty of England, or to restrain the issue of any special commission under the 28 *H.* 8, *c.* 15, for the trial of such offenders, if need there be.

Before this statute, treasons, felonies, robberies, murders, and confederacies, committed upon the high seas, within the jurisdiction of the Admiralty, must have been inquired of, &c., in such shire of the realm as should be specially limited for that purpose by the Queen's commission. 28 *H.* 8, *c.* 15, *s.* 1; *and see* 45 *G.* 3, *c.* 72, *s.* 114; *Rex* v. *Curling, R. & R.* 123. 'Acts of hostility by a subject of this realm against a subject at sea, under colour of a foreign commission; 11 & 12 *W.* 3, *c.* 7, *s.* 8; 18 *G.* 2, *c.* 30, *s.* 1; *see R.* v. *Evans*, 2 *East, P. C.* 798; forcibly boarding a merchant ship, and throwing over or destroying the goods; 8 *G.* 1, *c.* 24, *s.* 1; trading with pirates, or fitting out a vessel for that purpose; 8 *G.* 1, *c.* 24, *s.* 1; master or seamen running away with the ship, goods, &c., or laying violent hands on or confining the master, or making a revolt in the ship, &c; 11 *&* 12 *W.* 3, *c.* 7, *s.* 9; *see Reg.* v. *M'Gregor*, 1 *C. & K.* 429; dealing in slaves upon the high seas, or in any place where the admiral has jurisdiction, except as therein mentioned; 5 *G.* 14, *c.* 113; *see Reg.* v. *Zulueta*, 1 *C. & K.* 215: all these offences, if committed upon the high seas, were to be inquired of in the same manner; as also the offence of accessary before or after the fact, on land, or at sea, to piracy. 11 *&* 12 *W.* 3, *c.* 7, *s.* 10. *See* 8 *G.* 1, *c.* 24, *s.* 3; 7 *G.* 4, *c.* 64, *ss.* 9, 10. It has been doubted whether the stat. 28 *H.* 8, *c.* 15, applies to offences created since that statute; *R.* v. *Snape*, 2 *East, P. C.* 807; but this doubt has been removed by particular provisions in subsequent statutes. By stat. 39 *G.* 3, *c.* 37, it is enacted, that all offences committed upon the high seas shall be inquired of, &c., in like manner as treasons, &c., are directed to be by the stat. 28 *H.* 8, *c.* 15; and similar provisions are contained in the statutes 7 *&* 8 *G.* 4, *c.* 29, *s.* 77; 7 *&* 8 *G.* 4, *c.* 30, *s.* 43; 9 *G.* 4, *c.* 31, *s.* 32; 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 27; 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 10; 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 10; 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 13; 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 14; with respect to the trial of offences within those acts respectively

committed within the jurisdiction of the Admiralty. It may be necessary to mention here, that rivers, to the furthest point of land next the sea, creeks, and arms of the sea within the body of a county and the sea-shore between the high and low-water marks when the tide is out, are not within the jurisdiction of the Admiralty, or within the meaning of the term "high seas" in the above statutes. *But see R.* v. *Bruce, R. & R.* 243; 2 *Leach*, 1098. Upon an indictment for larceny out of a vessel lying in a river at *Wampu*, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; but the judges held that the Admiralty had jurisdiction, it being a place where great ships go. *R.* v. *Thomas Allen*, 1 *Mood. C. C.* 494. The offences above mentioned, when a commission is issued for the trial of them under 28 *H.* 8, *c.* 15, are inquired of, tried, and determined before the judge of the Admiralty Court, and two of the judges of the common-law courts, under a commission of oyer and terminer; and, in the indictment, no county is inserted in the margin as venue, but, instead of it, merely the words "*Admiralty of England.*" But where offenders are committed to or detained in the gaol of Newgate for the offences above mentioned, the Central Criminal Court Act, 4 & 5 *W.* 4, *c.* 36, *s.* 22, enacts, that it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commissions to be issued under the authority of the act, or any two or more of them, to inquire of, hear, and determine, any offence or offences committed or alleged to have been committed on the high seas, or other places within the jurisdiction of England, and to deliver the gaol of Newgate of any person or persons committed to or detained therein for any offence or offences alleged to have been done or committed upon the high seas within the jurisdiction of the Admiralty of England; and all indictments found, and trials and other proceedings had and taken by and before the said justices and judges, shall be valid and effectual to all intents and purposes whatsoever. The same section enables the justices and judges to order the payment of costs, in the manner prescribed by the stat. 7 *G.* 4, *c.* 64, *s.* 27. By virtue of this statute, and of the 7 *G.* 4, *c.* 64, *s.* 9, an accessary before the fact to a felony committed on the high seas, within the jurisdiction of the Admiralty, may be indicted and tried at the Central Criminal Court, although the person charged as the principal felon has not been committed to or detained in the gaol of Newgate for his offence. *Reg.* v. *Wallace, C. & Mar.* 200; 2 *Mood. C. C.* 200. As to the trial of offenders in the colonies for crimes committed in places in which the Crown has power or jurisdiction out of her Majesty's dominions, *see* 6 & 7 *Vict. c.* 94.

17. In informations or indictments against the master of a ship for forcing on shore or leaving behind, on shore or at sea, in any place in or out of her Majesty's dominions, any person belonging to his crew, the offence may be prosecuted in any court having criminal jurisdiction in her Majesty's dominions, at home or abroad, where such master or other person shall happen to be. 5 & 6 *W.* 4, *c.* 19, *s.* 40: *see also* 9 *G.* 4, *c.* 31, *s.* 30.

18. In indictments for murder or manslaughter, or for being accessary before the fact to murder, or after the fact to murder or manslaughter, if the stroke, poisoning, or hurt, be given upon the sea, or at any place out of England, and the party die in England, or if the stroke, poisoning, or hurt, be given in England, and the party die of the same at sea, or at any place out of England, the venue may be laid in the county in which the death, stroke, poisoning, or hurt hap-

pened. 9 *G.* 4, *c.* 31, *s.* 8. Where a man in a boat at a short distance from the shore was shot by a person on the shore, and died instantly, it was holden that the stroke and death were both upon the high seas, and therefore triable according to the above statute of *H.* 8, and not according to the repealed stat. 2 *G.* 2, *c.* 21, of which the statute of 9 *G.* 4, is, with respect to murder, a re-enactment. *R.* v. *Combe*, 1 *Leach*, 388; 1 *East*, *P. C.* 367. Under this statute, a British subject who, in a foreign country, commits murder on a foreigner, is triable in England. *Reg.* v. *Azzopardi*, 2 *Mood. C. C.* 288; 1 *C. & K.* 203.

19. Where a felony or misdemeanor is committed on the boundary of two or more counties, or within the distance of 500 yards of the boundary, or is begun in one county and completed in another, the venue may be laid in either county, in the same manner as if it had been wholly committed therein. 7 *G.* 4, *c.* 64, *s.* 12. The first branch of this enactment extends to the boundaries of counties only, and not to prosecutions in limited jurisdictions. *R.* v. *Welch*, 1 *Mood. C. C.* 175. This statute does not enable the prosecutor to *lay* the offence in one county and *try* it in the other; but only to lay *and* try it in either. *Reg.* v. *Mitchell*, 2 *Q. B.* 636; 2 *G. & D.* 274.

20. If a man commit a larceny, simple or compound, in one county, and carry the goods with him into another, he may be indicted for the simple or compound larceny in the county in which he committed it, or he may be indicted for it as for a simple larceny in the county into which, or in any of the counties through which, he carried the goods; for, in contemplation of law, there is such a taking and carrying away as constitute the offence of larceny in every place through which, at any distance of time, *R.* v. *Parkin*, 1 *Mood. C. C.* 45, the goods were carried by him. 1 *Hale*, 507; 2 *Hale*, 163; 3 *Inst.* 113; 1 *Hawk. c.* 33, *s.* 52; 4 *Bl. Com.* 304; 2 *East*, *P. C.* 771. The larceny itself is ambulatory, but the aggravated circumstances are fixed and stationary. 1 *Hale*, 536; *R.* v. *Thompson*, 2 *Russ.* 174. So, if a man, having stolen or otherwise feloniously taken any chattel, money, or valuable security, or other property whatsoever, in any one part of the United Kingdom, afterwards have the same in his possession in any other part of the United Kingdom, he may be indicted for larceny or theft in that part of the United Kingdom in which he so had the property, in the same manner as if he had actually stolen it there. 7 & 8 *G.* 4, *c.* 29, *s.* 76. But if the nature of the property be changed, an indictment for stealing the article in its original state cannot be preferred in the county into which, when so changed, the property is carried. *R.* v. *Edwards*, *R. & R.* 497: *R.* v. *Halloway*, 1 *C. & P.* 127. Nor, where several commit a joint felony in the county of A., and there divide the goods, and afterwards separately carry each his respective share into the county of B., can they be indicted for a joint felony in the latter county. *R.* v. *Barnet*, 2 *Russ.* 174. But if two persons steal a thing in one county, though one of them alone carry the property into another county, yet, if both afterwards co-operate to secure the thing in the latter county, both may be indicted in the latter county; for the subsequent concurrence may be connected with the previous taking. *R.* v. *County*, 2 *Russ.* 175: *R.* v. *M'Donagh*, *Car. Supp.* 23. The taking into the second county, however, must be *animo furandi*; the mere possession there is not sufficient. A constable took the defendant with two stolen horses in Surrey, and afterwards, at his request, rode with him on the horses into Kent, where he escaped;

the defendant was afterwards indicted in Kent, and the judges were unanimously of opinion that there was no evidence of stealing in Kent. *R.* v. *Simmonds*, 1 *Mood. C. C.* 408. If, however, the original taking be one of which the common law cannot take cognisance, as if the goods be stolen at sea, the thief cannot be indicted for the larceny in any county into which he may carry the goods, but the larceny must be tried as other cases within the jurisdiction of the Admiralty. 3 *Inst.* 113; 1 *Hawk. c.* 33, *s.* 52. A prisoner having stolen goods on the island of Jersey, had them in his possession in the county of Dorset, in which he was indicted and convicted, but it was holden that the conviction was wrong, because the original taking was such whereof the common law could not take notice, and the island of Jersey not being considered part of the United Kingdom, the case was not within the stat. 7 & 8 *G.* 4, *c.* 29, *s.* 76. *R.* v. *Prowes*, 1 *Mood. C. C.* 349: *see Reg.* v. *Madge*, 9 *C.* & *P.* 29. So, where A. ripped lead from a church in Buckinghamshire, and afterwards having it in his possession in Middlesex, was indicted in the latter county for a simple larceny at common law, it was holden that he could not be indicted in the latter county, the original offence not being a larceny at common law, but a statutable felony only. *R.* v. *Millar*, 7 *C.* & *P.* 665. By the 7 & 8 *Vict. c.* 61, *s.* 1, detached parts of counties are to be considered for all purposes as forming part of those counties of which they are considered part for the purposes of the election of knights of the shire, under 2 & 3 *W.* 4, *c.* 64.

21. In indictments for felonies or misdemeanors committed upon any person, or on or in respect of any property, in or upon any coach, cart, or other carriage whatsoever employed in any journey, or on board any vessel whatsoever employed in any voyage or journey upon any navigable river, canal, or inland navigation, the venue may be laid in any county through which the coach, &c., or vessel shall have passed in the course of the journey or voyage during which the felony or misdemeanor was committed, in the same manner as if if it had been actually committed therein; and where the side, bank, centre, or other part of the highway, river, &c., shall constitute the boundary of two counties, the venue may be laid in either of the counties through, or adjoining to, or by, the boundary of any part whereof the coach, &c., or vessel shall have passed in the course of the journey or voyage. 7 *G.* 4, *c.* 64, *s.* 13.

22. In indictments for conspiracies, the venue may be laid in any county in which it can be proved that an act was done by any one of the conspirators in furtherance of their common design. *See R.* v. *Brisac*, 4 *East*, 164. So, in indictments for compassing the Queen's death, or for any of the treasons in stat. 36 *G.* 3, *c.* 7, *s.* 1, (made perpetual by 87 *G.* 3, *c.* 6, *s.* 1), the venue may be laid in any county in which a sufficient overt act can be proved. *R.* v. *Lord Preston*, 4 *St. Tr.* 410, 455: *R.* v. *Vane*, *Kel.* 14, 15. *See Fost*, 9. In an indictment for sending a threatening letter, the venue may be laid either in the county where the prosecutor received it, *R.* v. *Girdwood*, 2 *East*, *P. C.* 1120; 1 *Leach*, 142: *R.* v. *Esser*, 2 *East*, *P. C.* 1125, or in the county from which the offender sent it. *See* 1 *Camp.* 215; 2 *Camp.* 506; 3 *B.* & *Ald.* 717. So, if a libel, *R.* v. *Burdett*, 4 *B* & *Ald.* 95: *R.* v. *Watson*, 1 *Camp.* 215, or a letter containing a challenge, be sent from the county of A. to the county of B., the venue may be laid in either county. So, if an act done in one county prove a nuisance to the other, in an indictment for it, the

venue may be laid in either county, although it has been said to be more correct to lay it in the county in which the act was done. *Staundf. b.* 2, 91. In indictments for embezzlement, where the money has been received in one county, and the receipt denied in another county, the venue has been holden to be well laid in either county. *R.* v. *Taylor*, 3 *B. & P.* 596; *R. & R.* 63: *R.* v. *Hobson*, *R. & R.* 56. And now, in this and in all cases in which the offence is begun in one county, and completed in another, the venue may be laid in either county. 7 *G.* 4, *c.* 64, *s.* 12, (*ante, p.* 24, *pl.* 19).

23. Accessaries before the fact to felony, whether indicted with or after the principal felon, or for a substantive felony, may be tried by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although committed on the high seas, or at any place on land within or without her Majesty's dominions; and if the offence of the accessary and of the principal felon be committed in different counties, the accessary may be indicted in either county. 7 *G.* 4, *c.* 64, *s.* 9; *see Reg.* v. *Wallace*, 2 *Mood, C. C.* 200; *C. & Mar.* 200, (*ante, p.* 23). In the highest and lowest offences, however, high treason and misdemeanor, all are principals, and must be indicted as such; that is, all persons who procure, incite, aid, abet, or assist in the commission of a misdemeanor, may be indicted as principals in the county in which the misdemeanor is committed, whether the procuring or inciting took place in that county or not, *see R.* v. *Johnson*, 7 *East*, 65, or in that in which the misdemeanor was begun by their procurement; (*ante, p.* 24, *pl.* 19); and in high treason, the venue may be laid in any county in which a sufficient overt act can be proved. If a person in one county procure an innocent agent to commit a felony in another county, he is in that case deemed a principal in the offence, and may be indicted for having actually committed it, the venue being laid either in the county in which it was committed, *Fost.* 349; *see R.* v. *Brisac*, 4 *East*, 164, or in that in which it was begun by his procurement. (*Ante, p.* 23, *pl.* 17). But if the person procured be privy to his criminal intent, and he himself amenable for the offence, then, if the offence be a felony, the party who procured it will be indictable as an accessary before the fact; if a misdemeanor, as a principal.

24. An accessary after the fact to a felony may be tried in the same manner as if the act constituting the accessary were committed at the same place as the principal felony, although the act may have been committed upon the high seas, or at any place on land within or without the Queen's dominions: and if the principal felony have been committed in one county, and the act constituting the accessary in another, the venue may be laid in either county. 7 *G.* 4, *c.* 64, *s.* 10.

25. Receivers of stolen property, whether indicted as accessaries after the fact, or for a substantive felony, or for a misdemeanor only, may be indicted in the county or place in which they have or had the property in their possession, or in which the principal may by law be tried, in the same manner as they may be tried in the county in which the property was actually received. 7 & 8 *G.* 4, *c.* 29, *s.* 56. Therefore, where the stealing is in county A., and the receiving in county B., both are triable in A., and the indictment may allege both the stealing and receiving to have been in A. *Reg.* v. *Henley*, 2 *M. & Rob.* 524. And if property stolen in one part of the United Kingdom be received in another, the receiver may be indicted in

that part of the United Kingdom in which the property was received. 7 & 8 *G.* 4, *c.* 29, *s.* 76.

Where, by the indictment or information, the court appears to have jurisdiction over the offence, no objection can be taken by motion in arrest of judgment, or by writ of error, for the want of a proper or perfect venue. 7 *G.* 4, *c.* 64, *s.* 20. *See Reg.* v. *Albert*, 5 *Q. B.* 37; 1 *Dav.* & *M.* 89.

*Caption.*]—The caption is no part of the indictment; it is merely the style of the court where the indictment was preferred, which is prefixed as a kind of preamble to the indictment upon the record, when the record is made up, or when it is returned to a *certiorari*. The following is a form of the caption to an indictment in a court of quarter sessions:—

"WESTMORELAND: *At the general quarter sessions of the peace, holden at Appleby in and for the county aforesaid, the——day of——, in the——year of the reign of our sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, before A. B. and C. D., Esquires, and other their associates, justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, by the oath of*" [the grand jurors, naming them] "*good and lawful men of the county aforesaid, sworn and charged to inquire for our said Lady the Queen, and for the body of the county aforesaid, it is presented,*" that J. S., late of Appleby in the county aforesaid, labourer, &c., so continuing the indictment. *See* 2 *Hale*, 166; 3 *Burn's J., by Chitty*, 328; *R.* v. *Fearnly*, 1 *Leach*, 425: *and see the forms*, 4 *Went.* 41, 105, 132, 150, 174, 222; 6 *Went.* 1, 357, 373; *Cr. Cir. Com.* 327; 2 *Hawk. c.* 25, *s.* 118, 126, 127, 128; 2 *Salk.* 605; 2 *Stra.* 865: *R.* v. *Warre*, 1 *Str.* 698: *R.* v. *Hall*, 1 *T. R.* 320.

It has been usual to insert the names of twelve grand jurors at the least in the caption, and Lord Hale says that this is necessary; it may be the presentment was by a less number than twelve, in which case it is not good: 2 *Hale*, 167: but in *R.* v. *Aylett*, 6 *Ad.* & *Ell.* 247, *n.*, where it was objected upon error that the caption did not contain the names of any of the jurors, the House of Lords, after consulting the judges, affirmed the judgment of the Court of Queen's Bench, that this was not essential; and in *R.* v. *Marsh*, 6 *Ad.* & *Ell.* 236, the chief justice agreed that the insertion of the names is not necessary. *See also R.* v. *Davis*, 1 *C.* & *P.* 470. As to the mode of rectifying a mistake in the caption, *see R.* v. *Justices of Middlesex*, 5 *B.* & *Ad.* 1113, *and R.* v. *Marsh*, 6 *Ad.* & *Ell.* 236.

If one of the grand jurors be a Quaker, or other person entitled to affirm instead of take an oath, the indictment ought to commence, "*The jurors for our Lady the Queen upon their oath and affirmation present,*" &c., 9 *C.* & *P.* 78. But this is not necessary where, in any legal proceedings, other legal proceedings are set out by way of recital. 6 & 7 *Vict. c.* 85, *s.* 2.

An indictment commencing, "*The jurors of our Lady the Queen,*" &c., is not bad in arrest of judgment; the words "of our Lady the Queen" may be rejected as surplusage, the jurors intended being those mentioned in the caption. *Reg.* v. *Turner*, 2 *M.* & *Rob.* 214.

## 2. *The Statement.*

In this part of the indictment, all the ingredients of the offence with which the defendant is charged, the facts, circumstances, and intent constituting it, must be set forth with certainty and precision, without any repugnancy or inconsistency, and the defendant must be charged directly and positively with having committed it.

*It must be certain as to the party indicted.*]—The defendant must be described in the indictment by his Christian name and surname, and by his addition. 2 *Hale*, 175. The inhabitants of a parish, however, may be indicted for not repairing a highway, or the inhabitants of a county for not repairing a bridge, without naming any of them. 2 *Roll. Abr.* 79.

The Christian name of the defendant must be such as he obtained at baptism or confirmation, *see* 2 *Roll. Abr.* 135: *Co. Lit.* 3, or both. *Weilden* v. *Holman*, 6 *Mod.* 115, 116. It is said that a man can have but one Christian name; 2 *Hale*, 175; but this must be understood to mean merely that he cannot be named "John *alias* James," or the like; that is, that a second Christian name cannot be given to him after an *alias dictus; see R.* v. *Newham*, 1 *L. Raym.* 562; *Scott* v. *Soans*, 3 *East*, 111; but it is quite clear, that if a man has acquired two names at baptism, or one at baptism, and another by confirmation, he may be indicted by both; and if these be misplaced, as if his name be *Richard James*, and he be named in the indictment *James Richard*, it is as much a misnomer, and may be pleaded in abatement in like manner, as if other and different names were stated. *Jones* v. *Macquillon*, 5 *T. R.* 195.

The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added in the indictment after an *alias dictus*, *Bro. Misnom.* 47, thus, "*Richard Wilson, otherwise called Richard Layer.*"

If the name of the prisoner be unknown, and he refuse to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison; but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, would be insufficient. *Rex* v. ——, *R. & R.* 488.

The additions required to be given to defendants in an indictment, by stat. 1 *H.* 5, *c.* 5, are the addition of their "estate, *or* degree, *or* mystery," and also the addition of the "towns, *or* hamlets, *or* places, *and* counties of which they were or be, or in which they be or were conversant." These additions should be added after the first name, and not after the *alias dictus*; 2 *Inst.* 699; *Anon.*, 3 *Salk.* 20; *R.* v. *Semple*, 1 *Leach*, 420; although, if an addition be given to the name after the *alias dictus*, it may be rejected as surplusage. 2 *Hawk.* c. 25, s. 70; *Id.* c. 27, s. 125.

Estate and degree mean the same thing, namely, the defendant's rank in life. A duke, marquis, earl, viscount, or baron, must be named by his Christian name only and his name of dignity: as "John, Duke of M.;" 2 *Inst.* 666; and the same of peeresses; as, "Ann, Countess of L.;" although there seems to be no objection to describing them by their surname also; as, William *Byron*, Baron Byron. 19 *St. Tr.* 1177. *See R.* v. *Brinklett*, 3 *C. & P.* 416. But this does not extend to foreign noblemen, who are entitled in this

country to the addition of esquire only, 2 *Hawk. c.* 23, *s.* 109, unless they be knights, in which case they should be named so; 2 *Inst.* 667; and the same as to the titles usually given to the eldest sons of dukes, &c. 3 *Inst.* 30; 2 *Inst.* 667; *and see* 2 *Salk.* 451. The addition of baronet, or knight, must be added to Christian and surname. 2 *Inst.* 665. *See R.* v. *Ferrers, Cro. Car.* 371.

A degree in one of the universities is a good addition; 1 *Bl. Com.* 405; 2 *Inst.* 668; so is the addition of "clerk" for a clergyman. *Ib.* "Esquire" is a good addition for the eldest sons of knights and their eldest sons in succession; for the eldest sons of peers; for the younger sons of peers and their eldest sons in succession; for foreign noblemen; for the esquires of knights of the bath; and for esquires by virtue of their offices, such as justices of peace. 2 *Inst.* 667. Gentleman is a good addition; so is yeoman.

Mystery means the defendant's trade, art, or occupation; such as merchant, mercer, tailor, parish clerk, schoolmaster, husbandman, labourer, or the like. 2 *Hawk. c.* 23, *s.* 111. If a man have two trades, he may be named of either; 2 *Inst.* 658; but if a man who is a gentleman by birth be a tradesman, he should be named by his worthier addition of gentleman, *Id.* 669; in all other cases he may be indicted by his addition of degree *or* mystery, at the option of his prosecutor. *See Mason* v. *Bushel,* 8 *Mod.* 51, 52: *Howpoole* v. *Harrison,* 1 *Str.* 556: *Smith* v. *Mason,* 2 *Str.* 816; 2 *Ld. Raym.* 1541.

The additions of degree or mystery usually given are,—to peers, peeresses, knights, esquires, clergymen, and gentlemen, the addition to which they are of right entitled; to other men, the addition of yeoman or labourer; 8 *Mod.* 51, 52; 1 *Str.* 556; 2 *Str.* 816; 2 *Lord Raym.* 1541; or to tradesmen, &c., the addition of their mystery; to widows, the addition of widow; to single women, the addition of spinster or single woman; to married women, usually thus, "Jane, the wife of John Wilson, late of the parish of C. in the county of B., labourer." Labourer, *R.* v. *Franklyn,* 2 *Ld. Raym.* 1179, or yeoman, 2 *Inst.* 668, is not a good addition for a woman. Servant is not a good addition; *R.* v. *Checkets,* 6 *M. & Selw.* 88; but servant to a particular person is, it is said, well enough. *Com. Dig. Abatement,* (*F*), 26; *Reg.* v. *Hoskins,* 2 *Ld. Raym.* 968; *S. C.* 6 *Mod.* 50. It is necessary to mention, that the degree or mystery must be stated as that to which the defendant was entitled at the time of the indict ment; *late* esquire, *late* grocer, or the like, would be bad. 2 *Inst.* 670.

As to the addition of place—the defendant must be described as of the town, *or* hamlet, *or* place, *and* county of which he was or is, or in which he is or was conversant.

A town may contain two or more parishes, and yet the town in that case would be a sufficient addition; *see* 2 *Inst.* 699; but if there be two or more towns in one parish, the defendant should be named of the town and not of the parish. *Ib.* If there be two towns of the same name in the county, but distinguished from each other by additions, as Great Dale, Little Dale, Upper Dale, Lower Dale, or the like, the defendant cannot be named of Dale only, without addition; but if the towns have no addition to distinguish them, he may. 2 *Hawk. c.* 23, *s.* 121; 1 *Chitt. Crim. L.* 609.

If the defendant reside in a borough or city which is a county of itself, the addition of that alone (as "*London*" for instance) will be sufficient without naming a parish. 2 *Inst.* 669.

If he reside in a hamlet out of a town, he may be described as of that; if in a hamlet of a town, he may be described as of either the town or hamlet. 2 *Hawk. c.* 23, *s.* 122.

"Parish" is a good addition; 2 *Inst.* 669; but if there be two or more towns in the parish, and the defendant reside in one of them, he should be named of the town. *Ib.*

If the defendant reside in a place known by a special name, and not within a town or hamlet, he may be named of such place; but if it be within a town or hamlet, it is safest to name him of the town or hamlet. 2 *Hawk. c.* 23, *s.* 123.

Besides being described of a town, or hamlet, or parish, or place, the defendant must also be described of the county in which such town, &c., is; and if he be described of a borough or city which is a county of itself, that alone will be sufficient. 2 *Inst.* 669.

The defendant may be described as late of the parish of B. in the county of C.; 2 *Inst.* 669, 670; although we have seen it is otherwise as to additions of degree or mystery.

If his place of residence be known, he may be described of it according to the truth; but when not known, it is usual to describe him of any parish in the county where the offence was committed.

In the case of a peer or peeress, the name and rank are placed before the addition of place; as, "*John, Duke of B., late of N. in the county of G.*" But in all other cases the addition of place goes first; as, "J. S., late of the parish of B. in the county of S., gentleman." To describe the defendant as "merchant of London," 4 *Ed.* 4, 10 *a*, *pl.* 13, or "parson of D. in the county of C.," 2 *Inst.* 699, would be bad, for it does not follow, from this description of him, that he resides there.

Besides the additions we have now mentioned, it may be necessary also, where a father and son are of the same name, and one of them is indicted, to add the terms "*the younger*," or "*the elder*," to his name, for the purpose of more clearly identifying him. 2 *Hawk. c.* 23, *s.* 106.

If there be no addition, *R.* v. *Warren*, 1 *Sid.* 247, or a wrong one, 2 *Inst.* 670, the defendant can take advantage of it by a plea in abate, ment only; if he plead over, he thereby waives all objections to the indictment on that account; 2 *Hawk. c.* 23, *s.* 125; *R.* v. *Checkets*, 6 *M. & Selw.* 91. So, if there be no Christian name, or a wrong one, or no surname, or a wrong one, the defendant can take advantage of it by a plea in abatement only; if he plead over, he waives the objection. It was formerly understood that a defendant could not plead a misnomer of his surname; 2 *Hawk. c.* 25, *s.* 68; 2 *Hale*, 176; but it seems now to be holden otherwise. *See R.* v. *Shakespeare*, 10 *East*, 83. But these objections are now of no real importance, for, if satisfied by affidavit or otherwise of the truth of a plea of misnomer, or want of addition, or wrong addition, the court may forthwith amend the indictment or information, and call upon the party to plead as if no such dilatory plea had been pleaded. 7 *G.* 4, *c.* 64, *s.* 19. And where a woman charged with the murder of her husband was described as "A., the *wife* of J. O.," &c., the judge under this statute, ordered an amendment by striking out the word "wife," and inserting the word "widow." *Reg.* v. *Orchard*, 8 *C. & P.* 565.. The statute of additions is not, however, repealed, nor is the rule of the common law with respect to the description of the party indicted abrogated by this statute.

*It must be certain as to the person against whom the offence was committed.*]—In indictments for offences against the persons or property of individuals, the Christian and surname of the party injured must be stated, if the party injured be known; 2 *Hawk. c.* 25, *ss.* 71,

72; as, for the murder of "*John Styles,*" larceny of the goods of "*John Styles,*" burglary in the dwelling-house of "*John Styles,*" and therein stealing the goods of "*John Nokes,*" and the like. The name so stated must be either the real name of the party injured, or that by which he is usually known; *R.* v. *Norton, R. & R.* 510: *R.* v. *Berriman*, 5 *C. & P.* 601; *Anon.*, 6 *C. & P.* 408: *R.* v. *J. Williams*, 7 *C. & P.* 298: (*see post*, "*Larceny*"); as, for instance, upon an indictment for the murder of a bastard child, it cannot be described by the name of its mother, unless that name have been gained by reputation. *R.* v. *Clark, R. & R*, 358: *R.* v. *Ellen Waters*, 1 *Mood. C. C.* 457: *Reg.* v. *Mary Evans*, 8 *C. & P.* 765: *Reg.* v. *Stroud*, 2 *Mood. C. C.* 270; 1 *C. & K.* 187. A bastard is *quasi nullius filius*, and can have no name of reputation as soon as he is born. *Co. Litt.* 36. Where, therefore, upon an indictment for the murder of a female bastard child, whose name was to the jurors unknown, it appeared that the child had not been baptized, but that the mother, the prisoner, had said she should like to have it called *Mary Ann*, and had herself called it *Mary Ann*, and little *Mary*, it was held that the child had not acquired a name by reputation. *R.* v. *Mary Smith*, 1 *Mood. C. C.* 402. A child cannot be described as "a certain male infant of tender age, to wit, of the age of, &c., and not baptized:" the indictment must either state its name, or (if it have no name, either by baptism or reputation, *see Reg.* v. *Stroud, suprà*) state it to be to the jurors unknown. *Reg.* v. *Biss*, 2 *Mood. C. C.* 93; 8 *C. & P.* 773: *Reg.* v. *Hicks*, 2 *M. & Rob.* 302. But the absence of a name was held to be sufficiently accounted for by the child being described as "then lately before born of the body of A. B." *Reg.* v. *Hogg*, 2 *M. & Rob.* 380: *see Reg.* v. *Willis*, 1 *C. & K.* 722. Where the defendant was indicted for killing a woman whose name was to the jurors unknown, and who he sometimes said was his wife, and sometimes not, and there was no evidence of any name by which she was known, it was held, that if she was not his wife, and if her name could not be ascertained by any reasonable diligence, the description was correct. *Reg.* v. *Campbell*, 1 *C. & K.* 82. No addition is requisite; 2 *Hale*, 182; and it has been said that if stated it need not be proved; *R.* v. *Graham*, 2 *Leach*, 547: *R.* v. *Ogilvie*, 2 *C. & P.* 230; however, in *R.* v. *Deeley*, 1 *Mood. C. C.* 303; 4 *C. & P.* 579, where a defendant was indicted for marrying E. C., *widow*, his first wife being alive, it was holden that the addition was material. Where it appeared that the party injured had a mother of the same name, the Court held that it was not necessary to distinguish her in the indictment by the addition "the younger," although it was objected that in such a case, where such an addition is not given, the presumption is that it is the parent and not the child that is intended; and some cases were cited to that effect. *R.* v. *Peace*, 3 *B. & Ald.* 579. But where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and it should seem, that if he be described as a knight, when in fact he is a baronet, or the contrary, the variance would be fatal, because a name of dignity (baronet, for instance) is not merely an addition, but is actually a part of the name. 2 *Hawk. c.* 25, *ss.* 71, 72. A *baron* has been held well described as *Lord* A. *Reg.* v. *Pitts*, 8 *C. & P.* 771: *Reg.* v. *Elliott*, *Id.* 772, *n.*

An indictment for stealing the shroud of a dead person must state it to be the goods and chattels of the executor or administrator; 2 *Hale*, 181; or if there be no will or no administration, it should

seem that it may be laid to be the goods of the person who defrayed the expenses of the burial, or of the ordinary, if the shroud were purchased with the money of the deceased. So, if a coffin be stolen, it may be described in the same manner; or if, from length of time, it be difficult to ascertain the personal representatives of the deceased, it may be laid as the property of a person unknown; but it cannot be described as the property of the churchwardens of the parish from which it was stolen. *Anon.*, 2 *East, P. C.* 652. If goods, the property of a deceased person, be stolen after his death, and before administration granted, the property must be laid in the ordinary, and not in the administrator; for the rights of the administrator commence only from the date of the letters of administration, and in this respect differ from those of an executor, which take effect from the death of his testator. *R.* v. *George Smith*, 7 *C. & P.* 147. Where the stealing was from the person of a corpse in the highway, in the diocese of W., and it appeared that the last place of abode of the deceased person was in the diocese of G., but that he had left it, and was on his way to come to live with his father in the diocese of W., the property was held to be well laid in the bishop of W. *Reg.* v. *Tippin, C. & Mar.* 545. If property be stolen out of the possession of a bailee, it may be described in the indictment as the property either of the bailor or the bailee; 2 *Hale*, 181; although the goods were never actually in the real owner's possession, but in possession of the bailee only. *R.* v. *Remnant, R. & R.* 136; 4 *C. & P.* 391. As, for instance, goods left at an inn, *R.* v. *Todd*, 2 *East, P. C.* 658, or entrusted to a person for safe keeping, *R.* v. *Taylor*, 1 *Leach*, 356: *R.* v. *Statham, Ib.*, or to a carrier to carry; *R.* v. *Deakin*, 2 *East, P. C.* 653: *see R.* v. *Spears*, 2 *Leach*, 325; 2 *East, P. C.* 568; cloth to a tailor to make into clothes; linen to a laundress to wash; *R.* v. *Packer, Ib.*; 1 *Leach*, 357; goods pawned and the like—may be laid to be the goods and chattels of the person to whom they are so entrusted, &c., or of the owner, at the option of the prosecutor. *See* 2 *Hale*, 181; 1 *Hale*, 513; 2 *East, P. C* 652; 1 *Hawk. c.* 33, *s.* 47; 2 *Leach*, 875. * So, where cattle were alleged in the indictment to be the property of a person, who, it appeared in evidence, was merely the agister and not the actual owner, the judges held it to be sufficient. *R.* v. *Woodward*, 2 *East, P. C.* 653. But where a bailor steals his own goods from his bailee, they must be described in the indictment as the goods of the bailee. *R.* v. *Wilkinson, R. & R.* 470: *R.* v. *Bramley, Id.* 478. Goods must not, however, be described as the property of one who has neither the actual nor constructive possession of them. *R.* v. *Adams, R. & R.* 225. Thus, if it appear that the person named as owner is merely servant to the real owner, the defendant must be acquitted; 2 *East, P. C.* 652; for a servant has not a special property in the goods, the possession of the servant being the possession of the master. *R.* v. *Hutchinson, R. & R.* 412; 2 *Russ.* 158. So, where the person named as owner appears to be a married woman, the defendant must be acquitted; because in law the goods are the property of the husband; 1 *Hale*, 513; even though she be living apart from her husband upon an income arising from property vested in trustees, for her separate use, because the goods cannot be the property of the trustees; and, in law, a married woman has no property. *R.* v. *French, R. & R.* 491: *see R.* v. *Wilford, Id.* 517. But where the goods were stolen from a *feme sole*, and before indictment found she married, it was holden, that describing her as the owner of the goods by her maiden name was

sufficient. *R.* v. *Turner*, 1 *Leach*, 536. Goods let with a ready-furnished lodging must, if a larceny of them be committed by a third person, be described as the goods of the lodger, for the owner neither has nor is entitled to the possession; *R.* v. *Belstead*, *R.* & *R.* 411: *R.* v. *Brunswick*, 1 *Mood. C. C.* 26; 2 *Russ.* 154; but if a larceny be committed by the lodger, then the goods may be described as the property of the owner, or person letting to hire. 7 & 8 *G.* 4. *c.* 29. *s.* 45: *see R.* v. *Healey*, 1 *Mood. C. C.* 1. Goods seized under a writ of *fieri facias* may be described as the goods of the party against whom the writ issued; for, although they are *in custodiâ legis*, the original owner continues to have a property in them until they are sold. *R.* v. *Easthall*, 2 *Russ.* 158. So, if A. steal the goods of B., and afterwards C. steal the same goods from A., they may be described as the goods either of B. or A., for the possession of the former is not divested by the tortious taking. *R.* v. *Wilkins*, 1 *Leach*, 522, 523; 1 *Hale*, 537; 2 *East*, *P. C.* 654. Clothes or other necessaries furnished by a father to his child may, it seems, be laid as the property either of the father or of the child, particularly if the child be of tender age; *R.* v. *Hayne*, 12 *Co.* 113; 2 *East*, *P. C.* 653; but it is safer, perhaps, to allege them to be the property of the child. *See R.* v. *Forsgate*, 1 *Leach*, 463, 464, *n.*: *Reg.* v. *Hughes*, *C.* & *Mar.* 593.

Formerly, where goods stolen were the property of partners, or joint owners, all the partners or joint owners must have been correctly named in the indictment, otherwise the defendant would have been acquitted. But now, whenever it may be requisite, in any indictment or information for any felony or misdemeanor, to state the ownership of any property whatsoever, whether real or personal, belonging to or in the possession of more than one person, whether partners in trade, joint tenants, parceners, or tenants in common, (including joint-stock companies and trustees), one person only need be named, and the property may be described as belonging to the one person so named, and another or others, as the case may be; which description will also be sufficient whenever it may be necessary to mention such person in any indictment or information. 7 *G.* 4, *c.* 64, *s.* 14. The words of the statute are "another *or* others;" and therefore, where a prisoner was indicted for stealing paper, the property of George Eyre and others, and it appeared in evidence that the paper was the property of George Eyre and another only, viz. Andrew Strahan, his partner, the prisoner was acquitted.—*per Denman*, *Com. Serj.*, *R.* v. *Hampton*, *Greenw. Col. Stat.* 143. But it is not necessary that a strict legal partnership should exist. Where C. and D. carried on business in partnership, and the widow of C., upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but, before the division, part of the stock was stolen; it was holden, that the goods were properly described as the joint property of the surviving partner and the widow, upon an objection that the children of C. ought to have been joined, or the goods described as the property of the surviving partner and the ordinary, no administration having been taken out. *R.* v. *Gabbey*, *R.* & *R.* 178. And where a father and son took a farm on their joint account, and kept a stock of sheep, their joint property, and, upon the death of the son, the father carried on the business for the joint benefit of himself and his son's children, who were infants, it was holden, upon an indictment for stealing

sheep bred from the joint stock, some before and some after the death of the son, that the property was well laid in the father and his son's children. *R.* v. *Scott*, *R.* & *R.* 13; 2 *East*, *P. C.* 655. In an indictment for stealing a Bible, a hymn-book, &c., from a methodist chapel, the goods were laid as the property of John Bennett and others, and it appeared that Bennett was one of the society and a trustee of the chapel: *Parke*, J., held that the property was laid correctly. *R.* v. *Boulton*, 5 *C.* & *P.* 537.

In indictments or informations by or on behalf of joint-stock banking co-partnerships, for stealing or embezzling money, goods, effects, bills, notes, securities, or other property belonging to them, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such co-partnerships, the money, &c., may be stated to be the property of, and the intent may be laid to defraud, any one of the public officers of such co-partnerships; and the name of any one of their public officers may be used in all indictments or informations where it otherwise would be necessary to name the persons forming the company. 7 *G.* 4, *c.* 46, *s.* 9. It has been doubted whether, upon an indictment by a joint-stock bank for forgery, the intent must not be laid to defraud a public officer of such co-partnership; *R.* v. *Burgess*, 7 *C.* & *P.* 490; but the better opinion seems to be that this statute is cumulative merely; *R.* v. *James*, 7 *C.* & *P.* 553; and that the prosecutor may at his option describe the property, or lay the intent, according to this statute, or the stat. 7 *G.* 4, *c.* 64, *s.* 14, (*ante*, *p.* 33), or the stat. 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 28, by which it is sufficient in any indictment for forgery to name one person only, where the intent is to defraud a company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be. And under the stat. 1 & 2 *Vict.* *c.* 85, which was continued by 3 & 4 *Vict.* *c.* 111, and subsequent acts, a shareholder in a joint-stock banking company may be indicted for stealing or embezzling the goods or money of the company, it being laid as the property of a public officer of the company, duly appointed, and registered under the acts. *See Reg.* v. *Atkinson*, 2 *Mood.* *C. C.* 278; *C.* & *Mar.* 525.

In indictments or informations for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole or in part at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, &c., to be used for making, altering, or repairing any bridge or any highway at the ends thereof, or any court, &c., or to be used in or with any such court or other building, the property, whether real or personal, may be described as belonging to the inhabitants of such county, &c., without specifying their names. 7 *G.* 4, *c.* 64, *s.* 15.

In indictments or informations for any felony or misdemeanor committed in, upon, or with respect to any workhouse or poor-house, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poor-house in or belonging to the same, or by the master or mistress of such workhouse or poor-house, or by any workmen or servants employed therein, the property may be described as belonging to the overseer of the poor for the time being of such parish, &c., without specifying their names. 7 *G.* 4, *c.* 16: *see* 55 *G.* 3, *c.* 137,

*s.* 1: *R.* v. *Went, R. & R.* 359. And by 5 & 6 *W.* 4, *c.* 69, *s.* 7, the guardians of the poor of every union formed by virtue of the 4 & 5 *W.* 4, *c.* 76, and of every parish placed under the control of a board of guardians by virtue of that act, are made a corporation, by the name of the "Guardians of the Poor of the ——— Union, (or of the Parish of ———), in the County of ———;" and, as such corporation, are empowered to accept, take, and hold, for the benefit of the union or parish, any buildings, lands, or hereditaments, goods, effects, or other property; and by that name to bring actions, to prefer indictments, &c.; and in every such action or indictment relating to any such property, it shall be sufficient to lay or state the property to be that of the guardians of the ——— union, or of the parish of ———.

If any felony or misdemeanor be committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway, within any parish, &c., otherwise than by the trustees or commissioners of any turnpike road, the property may be described as belonging to the surveyor or surveyors of the highway or highways for the time being, without specifying their names. 7 *G.* 4, *c.* 64, *s.* 16. So, if any felony or misdemeanor be committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any act of Parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, the property may be described as belonging to the trustees or commissioners of the road, without specifying their names. 7 *G.* 4, *c.* 64, *s.* 17.

In indictments or informations for any felony or misdemeanor committed on or with respect to any sewer, or other matter within or under the view, cognisance, or management of any commissioners of sewers, it will be sufficient to state any such property to belong to the commissioners of sewers, within or under whose view, cognisance, or management, any such things may be; and the names of the commissioners need not be specified. 7 *G.* 4, *c.* 64, *s.* 18.

Monies or valuable securities embezzled by persons in the public service may be described as the property of the Queen. 2 *W.* 4, *c.* 4, *s.* 4.

Goods stolen in the house of a person who had been convicted of felony, and is undergoing his sentence, may be described as the property of the Queen, although there has been no office found: but the house cannot be so described without office found. *Reg.* v. *Whitehead,* 9 *C. & P.* 429; 2 *Mood. C. C.* 181.

The monies, goods, chattels, securities for money, and all other effects whatever, belonging to any friendly society, may be described to be the property of the person appointed to the office of treasurer or trustee of the society for the time being, in his proper name, without further description. 10 *G.* 4, *c.* 56, *s.* 21; 2 *Hawk. c.* 25, *ss.* 71, 72: *see* 4 & 5 *W.* 4, *c.* 40. A box belonging to a benefit society was stolen from a room in a public-house; two of the stewards had keys of this box, and by the rules of the society the landlord ought to have had a key, but in fact had not; and it was holden that the prisoner might be convicted on a count laying the property in the landlord alone. *R.* v. *Wymer,* 4 *C. & P.* 391. If the property be stolen by a trustee, it may be laid in the treasurer, and *vice versâ.* *Reg.* v. *Cain, C. & Mar.* 309; 2 *Mood. C. C.* 204.

In indictments for stealing, pawning, selling, buying, exchanging, receiving, embezzling, secreting, or not accounting for clothes, linen, or other goods belonging to the hospital at Chelsea, or the commissioners thereof, the property may be laid to be in the "Lords and others, Commissioners of the royal hospital for soldiers at Chelsea, in the county of Middlesex;" and in all prosecutions upon the stat. 7 *G.* 4, *c.* 16, it will be sufficient to charge the act as done with intent to defraud "the Lords and others, Commissioners of the royal hospital for soldiers at Chelsea, in the county of Middlesex." 7 *G.* 4, *c.* 16, *s.* 31.

In indictments for stealing post-letters, &c., &c., the property may be laid in the Postmaster-General. 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 40.

Property vested in a body of persons must not be laid as that property of that body, unless it be incorporated, but must be described as the property of the individuals who constitute that body, or some of them, as in the case of partners, trustees, or joint-stock companies. *R.* v. *Sherrington,* 1 *Leach,* 513: *R.* v. *Beacall,* 1 *Mood. C. C.* 15. But when goods of a corporation are stolen, they must be laid to be the property of the corporation, in their corporate name, and not in the names of the individuals who comprise it; *R.* v. *Patrick,* 3 *East, P. C.* 1059; 1 *Leach,* 253; and there is a difference in this respect between an ancient corporation and a corporation newly created; an ancient corporation may by use have a special name, differing in substance from that by which they were originally incorporated, and they may plead and be impleaded by that name; but a corporation created within memory must plead and be impleaded by the name by which they were incorporated. *Hob.* 211; *Noy,* 54; 2 *Brownl.* 292; *Latch,* 229; 11 *Co.* 94; *Dy.* 279; 3 *Mod.* 6; *Cro. El.* 351; *Bac. Abr. Corp.* (C. 3): *and see* 10 *Co.* 87; 1 *Leach,* 513.

If the name of the party injured be unknown to the prosecutor, as in the case of the murder of a stranger, or larceny from the person of a stranger who does not come forward to prosecute, or the like, he may be described in the indictment as a person unknown; 2 *Hale,* 181; thus, for instance, a man may be indicted for the murder of, or for stealing the goods of, "*a certain person to the jurors aforesaid unknown.*"

If at the trial it appear in evidence that the party injured is misnamed, or that the owner of the goods or house, &c., is another and different person from him named as such in the indictment, the variance is fatal, and the defendant must be acquitted. 2 *East, P. C.* 651, 781. But if the name proved be *idem sonans* with that stated in the indictment, and different in spelling only, the variance will be immaterial. Thus, Segrave for Seagrave, *Williams* v. *Ogle,* 2 *Str.* 889; Benedetto for Beniditto, *Abitbol* v. *Beniditto,* 2 *Taunt.* 401; Whyneard for Winyard, pronounced Winnyard, *R.* v. *Foster, R. & R.* 412, is no variance. But it has been decided that M'Cann and M'Carn, *R.* v. *Tannett, R. & R.* 351; Shakespear and Shakepear, *R.* v. *Shakespear,* 2 *East,* 83; Tabart and Tarbart, *Bingham* v. *Dickie,* 5 *Taunt.* 114; Shutliff and Shirtliff, 1 *Chit. C. L.* 216; 3 *Chit. Burn,* 341, are not the same in sound. If he be described as a certain person to the jurors unknown, and it appear in evidence that his name is known, the defendant will be acquitted. *See R.* v. *Walker,* 3 *Camp.* 264: *R.* v. *Robinson,* 1 *Holt,* 595. In an indictment for receiving stolen goods, if the principal felon be unknown, he may be described as a certain person to the jurors aforesaid unknown; *R.* v. *Thomas,* 2 *East, P. C.* 781; if, however, it appear in evidence that the princi-

*pal felon is known, the receiver will be acquitted; R.* v. *Walker*, 3 *Camp.* 264; *but he will not be entitled to his acquittal merely because the same grand jury have found a bill imputing the principal offence to J. S. R.* v. *Bush, R. & R.* 372.

If the party injured be designated by a name of office or other descriptive appellation instead of his real name, it cannot be objected to by writ of error or motion in arrest of judgment; for no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed, for that any person or persons mentioned in the indictment or information is or are designated by a name of office, or other descriptive appellation, instead of his or their proper names. 7 *G.* 4, *c.* 64, *s.* 20.

Where it is essential to constitute the offence that the party injured should have been of a certain age (as in an indictment upon the 9 *G.* 4, *c.* 31, *s.* 17, for carnally knowing a girl above ten and under twelve years of age), the party must be stated in *every* count of the indictment to be of that age; and it will not be sufficient to state the age in the first count only, and in a subsequent count merely to describe the party as "the said A. B." *Reg.* v. *Martin*, 9 *C. & P.* 215.

*It must be certain as to time and place.*]—Time and place must be added to every material fact in an indictment; *Staund.* 95 *a.*; *R.* v. *Holland*, 5 *T. R.* 607: *R.* v. *Aylett*, 1 *T. R.* 69: *R.* v. *Haynes*, 4 *M. & Selw.* 24; that is, every material fact stated in an indictment must be alleged to have been done on a particular day, and at a particular place. As to what are material facts, it is necessary to observe that every offence consists of the commission or omission of certain acts under certain circumstances; and each of these, being a necessary ingredient in the offence, is material, and must be stated in the indictment. An offence of omission, or a mere nonfeasance, cannot, indeed, strictly be said to have been committed at any time or place; and therefore, in an indictment for such an offence, the allegation of time and place is, in general, unnecessary; *Com. Dig. Indictment*, (*G.* 2); 2 *Hawk. c.* 25, *s.* 79; yet if it be an indictable offence to omit doing an act at a particular time or at a particular place, an indictment for it should undoubtedly shew that it was not done at that time or at that place. But in an indictment for offences of commission, every act which is a necessary ingredient in the offence must be laid with time and place, as above mentioned. Thus, if in an indictment for murder, it be stated that J. S., at such a time and place, having a sword in his right hand, did strike J. N., &c., it is insufficient; for the time and place laid relate to the having the sword, and consequently it is not said when or where the stroke was given. 2 *Hale*, 178; *R.* v. *Cotton, Cro. El.* 738. So that J. S., at such a time and place, made an assault upon J. N., *et eum cum gladio felonice percussit*, was holden bad, because it was not said, *ad tunc et ibidem percussit. Dy.* 68, 69. Yet an indictment for a battery, where time and place were laid to the assault, but not to the battery, has been holden good; 2 *Hale*, 178; and this distinction seems to have been established, that in felonies, *in favorem vitæ*, the greatest strictness above mentioned (namely, that time and place be laid to every material fact) is required; but in indictments for misdemeanors, if time and place be added to the first act, it shall be construed equally to refer to all the ensuing acts. *See R.* v. *Bank, Cro. Jac.* 41. However, in practice, time and place are added to every

material fact, as well in indictments for misdemeanors as in indictments for felony. What we have now said relates to *acts* which are necessary ingredients in the offence; for mere circumstances accompanying these acts need not be laid with time and place, *March, pl.* 127; *R.* v. *Johnson*, 2 *Rol. Rep.* 226, unless rendered essential by the particular nature of the offence. Thus, in an indictment for bigamy, in averring that the first wife was alive at the time of the second marriage, it is not necessary to allege a place where; *Stark. Cr. pl.* 62; although, from the nature of the offence, the time must necessarily be stated.

The time laid should be the day of the month and year upon which the act is supposed to have been committed. A day certain must be stated; 2 *Hawk. c.* 25, *s.* 77; and this at present is always the day of the month, although naming it as a feast day, or "the Octave of the Holy Trinity," or the like, seems to be sufficient. *Com. Dig. Indictment*, (G. 2). The year must also be stated, otherwise the indictment will be insufficient; 2 *Hale*, 177; 1 *Chit. C. L.* 217; and the year of the Queen's reign is usually inserted; but the year of our Lord is unobjectionable. It is said, that alleging the act to have been committed on such a day *last past* would be sufficient, because it would be rendered certain by the caption of the indictment; *Com. Dig. Indictment*, (G. 2); *Lamb.* 491; but this perhaps is doubtful, if the objection were made at the time of the trial. In no case is it necessary to state the hour at which the act was done, unless rendered essential by the statute upon which the indictment is framed. 2 *Hawk. c.* 25, *s.* 76: *and see Coombe* v. *Pitt*, 3 *Bur.* 1434: *R.* v. *Clarke*, 1 *Bulst.* 204; *March, pl.* 127; 2 *Inst.* 318. In burglary, indeed, it is usual to state it; but alleging the offence to have been committed "*in the night*," without mentioning the hour, seems to be sufficient; *but see* 1 *Hale*, 549; *R.* v. *Waddington*. 2 *East, P. C.* 513; 2 *Hawk. c.* 25, *ss.* 76, 77. In an indictment upon stat. 9 *G.* 4, *c.* 69, for unlawfully entering or being in a close by night for the purpose of taking game, armed, it is not necessary to state the hour of the night. *R.* v. *Davis*, 10 *B.* & *C.* 89.

The place (or *special venue*, as it is technically termed) must be such as in strictness the jury who are to try the cause should come from. At common law, the jury, in strictness, should have come from the town, hamlet, or parish, or from the manor, castle, or forest, or other known place out of a town, where the offence was committed; and for this reason, besides the county, or the city, borough, or other part of the county to which the jurisdiction of the court is limited, it was formerly necessary to allege that every material act mentioned in the indictment was committed in such a place; and where a city or town contained two or more parishes, or a parish two or more towns, the parish or town in which the offence was committed must have been stated. *See* 2 *Hawk. c.* 23, *s.* 92; *R.* v. *Mackally*, 9 *Co.* 66 *b*; *Sid.* 325. For the same reason it was usual, in London, to name both the ward as well as the parish, thus: "*in the parish of St. Mary-le-bow, in the ward of Cheap*;" but this was not requisite, nor was it necessary in other cases to mention the hundred in which the parish was situate. This rule was not altered by the repealed statutes, 4 & 5 *Anne, c.* 16, and 24 *G.* 9, *c.* 18, which extended to civil cases only; but now the jury in criminal cases are returned from the body of the county, and not as formerly from any particular *visne*; 6 *G.* 4, *c.* 50, *s.* 13; and therefore it is now sufficient to state only the county, or the city, borough, or other part of

the county to which the jurisdiction of the court is limited, in all cases which are not of a local nature. *See R.* v. *Lawrence*, 3 *Cowp.* 78: *R.* v. *Leadbeater*, 3 *Burn. J.*, *by Chitty*, 332: *R.* v. *Dowling*, *Ry. & M. N. P.* 433; 2 *Camp.* 77. The county, &c., so stated must be the same as that stated as venue in the margin of the indictment. *See* 2 *Hale*, 180. Indictments for offences within the admiral's jurisdiction, (*ante*, *p.* 22, *pl.* 17), must allege each act to have been done "*on the high seas;*" and it is usual to add "*within the jurisdiction of the Admiralty of England;*" 2 *Stark. Cr. pl.* 455; sometimes the place or land near which the offence was committed is also stated; but this is not necessary.

Time and place are usually alleged thus: That J. S., of &c., "*on the third day of May, in the first year of the reign of our sovereign Lady Victoria, in the parish of B., in the county of C.,*" or "*in the county aforesaid,*" *see R.* v. *Burridge*, 3 *P. Wms.* 439, referring to the county in the margin; but it is sufficient to allege the offence to have been committed "*in the county of C.,*" or "*in the county aforesaid,*" without naming the parish, in all cases which are not of a local nature. And in cases which *are* of a local nature, it is sufficient to allege the offence to have been committed at a place (naming it) in the county aforesaid, without stating the place to be a parish, village, chapelry, or the like. *Reg.* v. *Brookes*, *C. & Mar.* 544. And if all the acts constituting the offence be supposed to have been done at the same time, it is sufficient, to all but the first, to allege time and place by the words "*then and there,*" referring to the time and place mentioned to the first act, without saying, "*on the day and year aforesaid, at the parish aforesaid, in the county aforesaid,*" or repeating the day and year, parish and county, to every act. The time and place, however, must be laid with certainty; and therefore, where the indictment described the defendant as late of W., and laid the offence to have been committed "in the *parish* aforesaid," there being no parish before mentioned, W. not having been described as such, the court arrested the judgment, because no place was named with certainty from which a *visne* might come. *R.* v. *Matthews*, 5 *T. R.* 162; 2 *Leach*, 624. But where the indictment, after describing the defendant as "late of the parish of A., in the county of B.," charged the offence to have been committed "at the parish aforesaid," without any statement of the county, the court were disposed to think this good, but held that at all events it was aided, after verdict, by the 7 *G.* 4, *c.* 64, *s.* 20, (*post*, *p.* 40). *Reg.* v. *Albert*, 5 *Q. B.* 37; 1 *Dav. & M.* 89. Where the indictment described the place as being "in the county aforesaid," where there were two different counties before mentioned, it was holden bad, although one of the counties was mentioned in the defendant's addition merely. *R.* v. *Rolls*, 1 *Rol. Rep.* 223. In a recent case, where it was alleged in an indictment that a dwelling-house was "situate at the parish aforesaid," two parishes having been stated, it was holden that the parish last mentioned must be intended. *R.* v. *Richards*, 1 *M. & Rob.* 177. Where an indictment for stealing in a dwelling-house stated that the defendant at C., in the county of D., one coat, &c., in the dwelling-house of A. B., then and there being, did steal, without saying, "*there situate,*" it was holden sufficient. *R.* v. *Napper*, 1 *Mood. C. C.* 44. Where an indictment charged that the defendant, at the township of W., on the highway there, leading from the village of W. towards C., to another highway leading from the village of W. towards L., by a wall there extending into the said highway by him erected, had encroached, &c., it was held, that the

indictment was not uncertain, and that "there" and "said" could be referred only to the highway first mentioned. *R.* v. *Wright*, 1 *Ad.* & *Ell.* 434. And where, a parish being situate partly in two counties, an indictment for *larceny* alleged the offence to have been committed in the parish of A. in the county of B., not saying in that part of the parish of A. which lies in the county of B., it was holden sufficient: *R.* v. *Perkins*, 4 *C.* & *P.* 363: but this would not be sufficient for *burglary*, or any other offence of a local nature. *Reg.* v. *Brookes*, *C.* & *Mar.* 543. If an indictment lay the offence to have been done on the day and year aforesaid, and there be no day and year, or two different days, &c., before stated, it will be bad. So, if it lay it to have been done on a day certain, "and on divers other days and times," it will be bad for uncertainty; 2 *Hawk. c.* 25, *s.* 28; *and see English* v. *Purser*, 6 *East*, 395; unless it be for an offence which may have continuance, such as false imprisonment, *see Burgess* v. *Freelove*, 2 *B.* & *P.* 425, nuisance, or the like; at least, such is the rule in declarations, and, *a fortiori*, it should seem, in indictments. *See R.* v. *Dixon*, 10 *Mod.* 335: *R.* v. *Roberts*, 4 *Mod.* 101.

If no time or place be stated, or if the time or place stated be uncertain or repugnant, the defendant may demur; or if no time be stated, where time is of the essence of the offence; or no place, where the court does not appear, by the indictment or information, to have jurisdiction over the offence, the defendant may demur, move in arrest of judgment, or bring a writ of error; for the defect is not cured by verdict: but no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day which never happened; nor for want of a proper and perfect venue, where the court shall appear, by the indictment or information, to have had jurisdiction over the offence. 7 *G.* 4, *c.* 64, *s.* 20. This statute applies only where, by the indictment, the court appears to have jurisdiction over the offence; and, therefore, where an indictment commencing, "London, to wit," described the prisoner as late of London, and charged the defendant to have committed the offence in the parish of St. Mary-le-Bow, without stating that parish to be in London, it was held that this was not aided by the stat. 7 *G.* 4, *c.* 64, *s.* 20. *R.* v. *Minter Hart*, 7 *C.* & *P.* 123. Where there is no such place within the county as that in which the offence is laid, it has been said that the indictment is void; 3 *Camp.* 77: 1 *Phil. Ev.* 206; but in a late case, where the offence was laid in the parish of St. Thomas, Pensford, in the county of Somerset, and there was no proof that there was any such parish, it was held that this was not a valid objection, for it was not necessary to prove affirmatively the parish as laid. *R.* v. *Dowling*, *R.* & *M. N. P.* 433. And in a still more recent case, where an offence, not of a local nature, was described as having been committed in a parish which did not exist, the judges held that the defect could only be taken advantage of by plea in abatement. *R.* v. *Woodward*, 1 *Mood. C.C.* 323: *R.* v. *Bullock*, *Id.* 324.

But although time and place must thus be laid with certainty, it never was necessary that it should be laid according to the truth; for if the time stated were previous to the finding of the indictment, and

the place within the county or other extent of the court's jurisdiction, a variance between the indictment and evidence in the time when the offence was committed, *Kelynge*, 16; 2 *Inst.* 318; 3 *Inst.* 230; *R.* v. *Aylett*, 1 *T. R.* 70, 71, or in the place where committed, provided the place proved were within the jurisdiction of the court, 2 *Hawk. c.* 25, *s.* 84, was not material; and for this reason, in practice, all the facts in an indictment usually were, and still may be, stated to have occurred at the same time and place, time and special venue being laid as to the first fact, and afterwards referred to by the words "*then and there*," as to the others. There are some exceptions, however, to this rule. 1. The dates of bills of exchange, and other written instruments, must be truly stated when necessarily set out. 2. Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered. 3. If any time stated in the indictment is to be proved by matter of record, it must be truly stated. 4. If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated. *See R.* v. *Trehearne*, 1 *Mood. C. C.* 298. 5. If the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the parish must be truly stated. 6. Where a place named is part of the description of a written instrument, or is to be proved by matter of record, it must be truly stated. 7. If the place where the fact occurred be a necessary ingredient in the offence, it must be truly stated: and the slightest variance in these several respects, between the indictment and evidence, will, in felonies, be fatal, and the defendant must be acquitted; but in some of the above cases the variance may, in misdemeanors, be amended. 9 *G.*4, *c.* 15. (*See post, Evidence*). And lastly, where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited. *See R.* v. *Brown*, *M.* & *M.* 163. Also, in an indictment for murder, the death should be laid on a day within a year and a day from the time at which the stroke is alleged to have been given.

What is above mentioned as to place relates merely to special venue, and must be carefully distinguished from the place when stated as matter of local description; for, where a place is stated as matter of local description, the slightest variance between the description of it in the indictment and the evidence will be fatal. Thus, for instance, in indictments for stealing in the dwelling-house, &c., for burglary, for arson, for entering or being in a close by night for the purpose of taking game, armed, *R.* v. *Ridley*, *R.* & *R.* 515, or for forcible entry, or the like, if there be the slightest variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, it will be fatal.

*It must be certain as to the fact, circumstances, and intent, constituting the offence.*]—Every offence consists of certain acts done or omitted under certain circumstances; and in an indictment for the offence, it is not sufficient to charge the defendant generally with having committed it, as, that he murdered J. S., or stole the goods of J., or committed burglary in the house of J. S., or the like; but all the facts and circumstances constituting the offence must be specifically set forth. So, the offence must appear upon the face of the indictment to be a distinct substantive offence: you cannot charge a man with being a common thief, a common champertor, conspi-

rator, common malefactor, or common robber; but if he have committed a larceny, robbery, &c., the indictment must set forth every fact and circumstance which is a necessary ingredient in the offence. Thus, an indictment for extortion, charging that the defendant took extorsively for every horse so much, and for every twenty sheep so much, was holden bad, because it charged the defendant with extortion generally, and not upon any particular occasion. *R.* v. *Roberts*, 4 *Mod.* 103. So, that the defendant was a calumniator, and a common and turbulent breaker of the peace, &c., was holden bad, for the same reason. *R.* v. *Taylor*, 2 *Str.* 849, 1246; 2 *Hale*, 182. And the same where a constable was indicted for behaving badly and negligently in the execution of his office, without specifying any particular instance of negligence, &c. *R.* v. *Witherington*, 1 *Str.* 2. The only exceptions to this rule are,—1. That a man may be indicted for being a "a common barretor," without detailing the particulars of the barretry. 2. That a woman may be indicted for being "a common scold," without detailing the particulars of her conduct. 3. That a person may be indicted for keeping a common gambling-house or bawdy-house, without stating those circumstances which it may be necessary to give in evidence to shew that it is a house of that description. *See* 2 *Hawk. c.* 25, *ss.* 57, 59. 4. That in an indictment for soliciting or inciting to the commission of a crime, *R.* v. *Higgins*, 2 *East.* 5, or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. *But see Reg.* v. *Rowed*, 3 *Q. B.* 180; 2 *G. & D.* 518. In all other cases, every fact or circumstance which is a necessary ingredient in the offence must be set forth in the indictment.

And if any fact or circumstance which is a necessary ingredient in the offence be omitted in the indictment, such omission vitiates the indictment, and the defendant may avail himself of it by demurrer, motion in arrest of judgment, or writ of error. Thus, an indictment for assaulting an officer in the execution of process, without shewing that he was an officer of the court out of which the process issued; *R.* v. *Osmer*, 5 *East*, 304; *see R.* v. *Everett*, 8 *B. & C.* 114; for contemptuous or disrespectful words to a magistrate, without shewing that the magistrate was in the execution of his duty at the time; *R.* v. *Lease*, *Andr.* 226; against a public officer for non-performance of a duty, without shewing that he was such an officer as was bound by law to perform that particular duty; 5 *T. R.* 623; for obtaining money under false pretences, without shewing whose money it was; *R.* v. *Norton*, 8 *C. & P.* 196: *R.* v. *Martin*, 8 *Ad. & Ell.* 481; *quod exoneravit tormentum dans plagam*, without saying *percussit; R.* v. *Long*, 5 *Co.* 122 *b*; that he feloniously did lead away a horse, &c., without saying "take:" 2 *Hale* 184: in all these and the like cases, the indictment is bad, and the defect may be taken advantage of in the manner above mentioned. *See R.* v. *Cheere*, 7 *D. & R.* 461; 4 *B. & C.* 902; 1 *B. & Adol.* 861; 8 *Ad. & Ell.* 481.

Every fact and circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage, and need not be proved at the trial; *see* 7 *G.* 4, *c.* 64, *s.* 20; *R.* v. *Jones*, 2 *B. & Ad.* 611; also, if there be any defect in the manner of stating such matter, the defect will not vitiate the indictment. *R.* v. *Walker*, 4 *Co.* 41 *a*: *R.* v. *Long*, 5 *Co.* 121 *b*: *R.* v. *Holt*, 2 *Leach*, 593: *and see R.* v. *Howarth*, 3 *Stark.* 29. There is a custom of stating, in indictments for trifling offences, circumstances of gross

aggravation, contrary to the truth, which are at least useless, and should be avoided.

And not only must all the facts and circumstances which constitute the offence be stated, but they must be stated with such certainty and precision, that the defendant may be enabled to judge whether they constitute an indictable offence or not, in order that he may demur or plead to the indictment accordingly—that he may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly—that he may be enabled to plead a conviction or acquittal upon this indictment, in bar of another prosecution for the same offence—and that there may be no doubt as to the judgment which should be given, if the defendant be convicted. *See R.* v. *Horne, Cowp.* 675: *Reg.* v. *Rowed,* 3 *Q. B.* 180; 2 *G. & D.* 518. Therefore, in indictments for offences of a local nature, as burglary, arson, and stealing in the dwelling-house, &c., a local description of the house, &c., must be given, namely, the parish or place, and county in which it is situate: in indictments for obtaining money by false pretences, the false pretences must be specified: *R.* v. *Mason,* 2 *T. R.* 581: *R.* v. *Manoz,* 2 *Str.* 1127: in an indictment against a person for not serving the office of constable, the mode of election must be set out, to shew that he was legally elected; for if he were not legally elected, he cannot be guilty of a crime in not serving: *R.* v. *Harper,* 5 *Mod.* 96: an indictment for extortion must shew what fee was due, or that nothing was payable, *R.* v. *Lake,* 3 *Leon.* 268, as well as the fee exacted: an indictment for stopping up the King's highway must specify what part. *R.* v. *Roberts, Show.* 289. Also, for the same reasons, if the indictment charge the defendant with one or other of two offences, in the disjunctive, as that he murdered *or* caused to be murdered, forged *or* caused to be forged, 2 *Hawk. c.* 25. *s.* 58; *R.* v. *Stocker,* 1 *Salk.* 342, 371, *levavit* vel *levari causavit, R.* v. *Stoughton,* 2 *Str.* 900, conveyed *or* caused to be conveyed, &c., *R.* v. *Flint, Hardw.* 370, *see R.* v. *Morley,* 1 *Y. & J.* 22, it is bad for uncertainty; and the same, if it charge him in two different characters, in the disjunctive, as, *quoad* A. *existens servus* sive *deputatus,* took, &c. *Smith* v. *Mall,* 2 *Rol. Rep.* 263. So, an indictment which charges that the defendant, with a certain stick *or* staff which he had and held, upon A. did make an assault, &c., it seems to be bad for uncertainty. *Reg.* v. *Jones,* 1 *C. & K.* 243. So, an indictment which may apply to either of two different definite offences, and does not specify which, is bad. *R.* v. *Marshall,* 1 *Mood. C. C.* 158.

Certainty to a certain intent in general, however, is all that is required. *Co. Lit.* 303. *a.*; *R.* v. *Long,* 5 *Co.* 121 *a.* Certainty is of three kinds: certainty to a certain intent in every particular, which is required only in pleas, &c., of estoppel and pleas in abatement; certainty to a common intent, which is required in ordinary pleas; and certainty to a certain intent in general, which is required in declarations and indictments. The latter is a medium between the other two; not so great a degree of certainty as the first, and a greater degree of certainty than the second. I shall endeavour further to define them. Where certainty to a certain intent in every particular is required, the court will presume the negative of every thing the pleader has not expressly affirmed, and the affirmative of every thing the pleader has not expressly negatived; or, in the words of Lord Coke, the pleader must exclude every conclusion against him. Where certainty to a common intent only is required, the

court will presume, in favour of the pleader, every proposition which by reasonable intendment is impliedly included in the pleading, though not expressed; and where words are made use of, which admit of a natural sense, and also of an artificial one, or one to be made out by argument or inference, the natural sense shall prevail. Thus, if a plea state that the master and fellows of a college were seised in fee, it shall be intended in right of the college; *Fulmerston* v. *Stewart*, *Plowd.* 102; if a man plead feoffment, livery shall be intended, because it would not otherwise be a feoffment; *Co. Lit.* 303. *b.;* or, if he plead an assignment of dower, it shall be intended by metes and bounds, for otherwise it would not be a legal assignment. *Bro. Pleader*, 145; *Cadwalader* v. *Brian*, *Cro. Car.* 162. Common intent, however, is a rule of construction only, and not of addition; it cannot add to a sentence words which are not impliedly included in it; and therefore, in trespass, if the defendant plead a release, without shewing at what time it was made, the court cannot presume that it was made after the trespass, *Plowd.* 46. *a*, unless the particular trespass be specially mentioned in it. Certainty to a certain intent in general, being a medium between the two degrees of certainty above mentioned, may be inferred from what has just now been said respecting them; and it should seem, therefore, that in cases where it is required, every thing which the pleader should have stated, and which is not either expressly alleged or by necessary implication included in what is alleged, must be presumed against him. The court, however, will construe the words of the pleading according to their ordinary and usual acceptation, and technical terms according to their technical meaning. And if the sense of a word be ambiguous in the ordinary acceptation of it, it shall be construed according as the context and subject-matter require it to be, in order to render the whole consistent and sensible: thus, the word "*until*" may be construed inclusive or exclusive of the day to which it is applied, according to the context and subject-matter. *R.* v. *Stevens*, 5 *East*, 244. In *R.* v. *Bigg*, 1 *Str.* 18; 3 *P. Wms.* 419, the defendant was indicted for erasing the indorsement of a bank note, and it appeared that the words erased were on the face of the note, but the jury found that such was commonly called an indorsement; and a majority of the judges held, that the description was correct. In indictments against officers for neglect of duty or malversation in their offices, it is sufficient to allege that they were such officers at the time of the offence committed, without shewing their appointment; *see R.* v. *Holland*, 5 *T. R.* 623; for their regular appointment is presumed from their exercising the duties of their offices. If it be stated that the justices of our Lady the Queen were assigned by letters patent under "her seal of Great Britain," it shall be presumed to be the great seal, *R.* v. *Yandell*, 4 *T. R.* 521, for it could not be by any other.

Mere matter of inducement, however, does not require so much certainty as the statement of the gist of the offence. *R.* v. *Wright*, 1 *Vent.* 170; *Com. Dig. Indictment*, (G. 5). So, where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods" has been holden sufficient. *R.* v. ——, 1 *Chit. Rep.* 698. *See also R.* v. *Gill*, 2 *B. & Ald.* 209: *Reg.* v. *Kenrick*, 5 *Q. B.* 49; 1 *Dav. & M.* 208. So, in an indictment for soliciting and inciting

another to commit an offence, it is not necessary to state the offence contemplated with the same degree of certainty as in an indictment for the offence itself, even, it should seem, although the offence were afterwards actually committed. In indictments for perjury, also, the certainty formerly required, according to the rules above mentioned, is now no longer necessary; by stat. 23 *G.* 2, *c.* 11, it is necessary only to state the substance of the offence, and in what court or before whom the oath was taken, (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting out the bill, answer, &c., or any part of a record or proceeding in law or equity, other than as aforesaid, and without setting out the commission of the court or person before whom the perjury was committed. If, however, the prosecutor choose to state the offence with greater particularity than is required by this statute, he will be bound by the statement, and must prove it as laid. *R.* v. *Dowlin*, 5 *T. R.* 311, 317. And the same in every other case where an offence is stated in an indictment with greater particularity than is necessary, the unnecessary allegations, if descriptive of some ingredient in the offence, and not merely of circumstances of aggravation, are material and relevant, and cannot be rejected as surplusage. (*See post, Part* 2, *Ch.* 1).

Having made these general observations on the certainty required in indictments, we shall now proceed to examine the subject with relation to particular cases.

Written instruments, where they form a part of the gist of the offence charged, must be set out verbatim. Thus, in the case of forgery, the instrument forged must, before the stat. 2 *&* 3 *W.* 4, *c.* 123, *s.* 3, have been set out in the indictment in words or figures; *R.* v. *Mason*, 2 *East*, 180; 2 *East, P. C.* 975: *R.* v. *Powell*, 1 *Leach*, 77: *R.* v. *Hart. Id.* 145; *R.* v. *Lyon*, 2 *Leach*, 608; in an indictment for a libel, the libellous matter must be set out verbatim; *see Zenobio* v. *Axtell*, 6 *T. R.* 162; for sending a threatening letter, the letter must be set out verbatim; *R.* v. *Lloyd*, 2 *East, P. C.* 1123: *and see R.* v. *Hunter*, 2 *Leach*, 631; for not executing a warrant, the nature and tenor of the warrant must be shewn; *R.* v. *Burrough*, 1 *Vent.* 305: *Com. Dig. Indictment*, (G. 3); so, in an indictment for not obeying the order of justices of peace, the order must be set out verbatim. In perjury, it is not necessary to set out the affidavit, answer, &c., on which the perjury is assigned, verbatim, for the stat. 23 *G.* 2, *c.* 11, requires only the substance of the offence to be charged; but still it is advisable to set out verbatim the passages charged to be false, as it precludes all question of their being in substance the same as the defendant swore. In treason, also, if letters or other written instruments be laid as overt acts, it is sufficient to set forth the substance of them; for the gist of the offence is the compassing, &c., and the overt acts but proofs or evidences of it. *Fost.* 194; *R.* v. *Preston*, 4 *St. Tr.* 411: *R.* v. *Francia*, 6 *St. Tr.* 58, 73. In larceny of written instruments, made the subject of larceny by statute, *see* 7 *&* 8 *G.* 4, *c.* 29, *s.* 5, it is not necessary that the indictment should set them out verbatim; describing them in a general manner is sufficient; 2 *East, P. C.* 602, 777; thus, "one bank note for the payment of five pounds, and of the value of five pounds;" "one bill of exchange for the payment of fifty pounds, and of the value of fifty pounds;" or the like; for where a specific thing is made the subject of larceny, it is necessary merely to describe it as

such specific thing, it being a species of thing that is the subject of larceny. *R.* v. *Johnson*, 3 *M.* & *Selw.* 539. This rule applies to all instruments which are the subject of larceny; but the indictment must follow some of the descriptions given in the statute; for, where an indictment upon the repealed statute, 2 *G.* 2, *c.* 25, *s.* 3, which applied to bank notes, bills of exchange, and promissory notes, &c., described the instrument stolen as "a certain note, commonly called a bank note," it was holden insufficient. *R.* v. *Craven*, *R.* & *R.* 14. So, where the indictment described the instrument stolen as "a bank post bill;" it was holden bad, because it did not fall within any of the descriptions in that statute. *R.* v. *Chard*, *R.* & *R.* 488. And now, in an indictment for forging or uttering any instrument or writing, it is not necessary to set forth any copy or fac simile thereof, but it is sufficient to describe the instrument in such manner as would sustain an indictment for stealing the same. 2 & 3 *W.* 4, *c.* 123, *s.* 3. *See R.* v. *Warshaner*, 1 *Mood. C. C.* 466; 7 *C.* & *P.* 429: *R.* v. *Burgess*, 7 *C.* & *P.* 490: *R.* v. *James*, *Id.* 553: *Reg.* v. *Vaughan*, 8 *C.* & *P.* 276: *Reg.* v. *Sharpe*, *Id.* 436: *Reg.* v. *Rogers*, 9 *C* & *P.* 41.

Where the instrument must be set out verbatim, if the whole of it be included in the offence, the whole of it must be set out in the indictment. But where, upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus: "*8th March*, 1773. *Received the contents above by me, Stephen Withers*," without setting out the account at the foot of which it was written, it was holden sufficient. *R.* v. *Testick*, 1 *East*, 181, *n.* In all other cases, where part only of a written instrument is included in the offence, that part alone is necessary to be set out. As where some parts of a publication are libellous and others not, it is only necessary to state those parts containing the libels; and if the libellous passages be in different parts of the publication, distinct from each other, they may be introduced thus:—"in a certain part of which said libel there were and are contained the false, scandalous, malicious, and defamatory words and matter following, that is to say," &c. "And in a certain other part of which said libel there were and are contained," &c. *See Tabart* v. *Tipper*, 1 *Camp.* 350. Where the written instrument or parts of it are thus set out verbatim, great care must be taken to set them out correctly; the slightest variance between the indictment and evidence in this respect will, in felonies, be fatal, and the defendant will necessarily be acquitted; but, in misdemeanors, the variance may be amended during the trial, if the court shall think fit. 9 *G.* 4, *c.* 15. A mere literal variance, however, that is, where the omission or addition of a letter does not alter or change a word, so as to make it another word, *R.* v. *Drake*, 2 *Salk.* 661, will not be material; as, for instance, "receivd" for "received," *R.* v. *Hart*, 1 *Leach*, 145; 2 *East*, *P. C.* 977; "undertood" for "understood," *R.* v. *Beach*. *Cowp.* 229; "Messes." for "Messrs." *R.* v. *Oldfield*, 1 *Russell*, 360, or the like. Where it is necessary to set out the instrument, it must be engrossed upon the parchment; and it will not be sufficient to attach a fac simile to the parchment upon which the indictment is engrossed. *R.* v. *Warshaner*, 1 *Mood. C. C.* 466; 7 *C.* & *P.* 429. The object of setting out the instrument is, that the court may see and be able to form an opinion, whether it be that which it is alleged to be, and whether it falls within the statute or law upon which the indictment is

founded. Where, therefore, a libel is in a foreign language, it must be set out in the indictment, first in the language in which it is written, otherwise the defendant may demur, move an arrest of judgment, or bring a writ of error; *Zenobio* v. *Axtell*, 6 *T. R.* 162; and secondly, a translation of it must be set out, and must be proved at the trial to be a correct translation. *See R.* v. *Warshaner*, 1 *Mood. C. C.* 466; 7 *C. & P.* 429. And the same rule is equally applicable to all cases of written instruments in a foreign language. *R.* v. *Goldstein*, *R. & R.* 473; 3 *B. & B.* 201.

The recital of written instruments, which must be set out verbatim, is usually introduced by the words "*according to the tenor following*," or "*of the tenor following*," or "*in the words and figures following*," or "*the false, &c. words and matter following*," or other words which imply that a correct recital is intended; on the other hand, when the substance only is intended to be set out, it should be introduced by such words as "*in substance as follows*," "*to the effect following*," or the like. The word "tenor" implies that a correct copy is set out, and therefore the instrument must be set out correctly, *R.* v. *Powell*, 2 *East*, *P. C.* 976, even although the pleader need not have set out more than the substance of the instrument in that particular case. And the same as to "*the words and figures following*," or "*the words and matter following*." The words *ad tenorem et effectum sequentem* have been holden sufficient, as the word *effectum* in such a case may be rejected as surplusage. *R.* v. *Bear*, 2 *Salk*, 417; 1 *Id.* 324; 1 *L. Raym.* 415. The word "*effectum*" by itself, however, implies that the substance only is set out; 2 *Salk*, 417; and the same, of course, of the words "*in substance as follows*." *Wright* v. *Clement*, 3 *B. & Ald.* 503. It seems also to have been holden by *Buller*, J., *R.* v. *May*, 1 *Leach*, 193, that the words "in manner and form following," require the substance only to be set out. 1 *Doug.* 193.

If, after the word "*tenor*," or the like, the instrument be not set forth correctly, the defendant shall, in cases of felony, be acquitted for the variance, whether the instrument were required to be set out verbatim or not; *supra;* but in misdemeanors, the variance may be amended during the trial, if the court shall think fit. 9 *G.* 4, *c.* 15. If, on the other hand, the recital of the instrument be introduced by the words, "to the effect following," or "in substance as follows," and the nature of the case require a literal copy to be set forth, the defendant may demur, move in arrest of judgment, or bring a writ of error. *See Wright* v. *Clement*, 3 *B. & Ald.* 503.

If an indictment describe a written instrument as *purporting* to be so and so, the instrument when produced in evidence must appear upon the face of it to be what is described as purporting to be, otherwise the defendant will be acquitted for the variance; or, if the instrument be also set out verbatim in the indictment, the defendant may demur, move in arrest of judgment, or bring a writ of error. As, for instance, if the instrument be described as a "certain paper writing purporting to be a bank note," and the note produced, though made to resemble, vary materially in its form from a real bank note; *R.* v. *Jones*, 1 *Doug.* 300; or, if described as a bill of exchange, "purporting to be directed to one J. King, by the name and description of J. Ring;" for if it were really directed to J. Ring, it could not purport (that is, appear upon the face of it) to be directed to J. King. *R.* v. *Reading*, 1 *East*, 180, *n.*; 2 *Leach*, 590. *See R.* v. *Gilchrist*, 2 *Leach*, 657: *R.* v. *Edsall*, *Id.* 662.

Where words are the gist of the offence, they must be set forth in the indictment with the same particularity as a libel; as, for instance, in an indictment for scandalous or contemptuous words spoken to a magistrate in the execution of his office; *R.* v. *Bagg*, 1 *Ro. Rep.* 79: *R.* v. *How*, 1 *Str.* 699; or for blasphemous or seditious words. *R.* v. *Popplewell*, 1 *Str.* 686: *R.* v. *Sparling*, *Id.* 498. And if there be any material variance between the words proved and those laid, even if laid as spoken in the third person and proved to have been spoken in the second, *R.* v. *Perry*, 4 *T. R.* 217, the defendant must be acquitted. But if some of the words be proved as laid, and the words so proved amount to an indictable offence, it will be sufficient. Where words are laid as an overt act of treason, it is sufficient to set forth the substance of them; *Fost.* 194; *R.* v. *Layer*, 8 *Mod.* 93; 6 *St. Tr.* 328; for they are not the gist of the offence, but proofs or evidences of it merely.

Where any matter laid in an indictment is to be proved by a record, great care must be taken that the statement correspond exactly with the record; for the slightest variance in substance will be fatal. This subject, and that of variances between written and printed instruments, and the statement or setting forth thereof upon the trial, will be considered fully when we come to treat of the evidence necessary to support an indictment. It may, however, here be observed, that, by the 6 & 7 *Vict.* *c.* 85, *s.* 2, wherever, in any legal proceedings whatever, legal proceedings may be set out, it shall not be necessary to specify that any particular persons who acted as jurors had made affirmation instead of oath, but it may be stated that they served as jurymen in the same manner as if no act had passed for enabling persons to serve as jurymen without oath.

Where personal chattels are the subject of an offence, as in larceny, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated: *see* 2 *Hale*, 182, 183: thus, for instance, "*one coat of the value of twenty shillings, two pairs of boots of the value of thirty shillings, two pairs of shoes of the value of twelve shillings, two sheets of the value of thirteen shillings, of the goods and chattels of one J. S.*," or "*one sheep of the price of twenty shillings*," &c., and the like. If, for instance, it were "*twenty wethers and ewes*," the indictment would be bad for uncertainty; it should state how many of each. 2 *Hale*, 183. Goods may be described by the name by which they are known in trade; as, for instance, a set of new handkerchiefs in the piece may be described as so many handkerchiefs, though they are not separated from each other, if the pattern designate each, and they are considered in trade as so many handkerchiefs. *R.* v. *Nibbs*, *R.* & *R.* 27. Ingots of tin, or a bar of iron, may be described as so many pounds weight of tin or iron; but where an article has obtained, in common parlance, a particular name of its own, it would be wrong to describe it by the name of the material of which it is composed. *Reg.* v. *Mansfield*, 1 *C.* & *Mar.* 140. An indictment for a larceny of live animals need not state them to be alive, because the law will presume them to be so, unless the contrary be stated; but if when stolen the animals were dead, that fact must be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal. *R.* v. *Edwards*, *R.* & *R.* 497: *R.* v. *Halloway*, 1 *C.* & *P.* 128. *See R.* v. *Williams*, 1 *Mood. C. C.* 107. But if an animal have the same appellation whether it be alive or dead, and it makes no differ-

ence as to the charge whether it were alive or dead, it may be called, when dead, by the appellation applicable to it when alive. *R.* v. *Puckering*, 1 *Mood. C. C.* 242. An indictment for stealing chattels which are the subject of larceny only in particular cases or under certain circumstances, must shew that they fall within the requisite description. Thus, an indictment for stealing "three eggs" would be bad, because only the eggs of animals *domitæ naturæ* are the subject of larceny. *Reg.* v. *Cox*, 1 *C. & K.* 494. But an indictment for bestiality, which described the animal as "a certain bitch," was held sufficiently certain, although the females of foxes and some other animals, as well as of dogs, are so called. *Reg.* v. *Allen*, *Id.* 495.

The presecutor is bound by the description of the species of goods stated: as, for instance, an indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of a pair of boots. But a variance in the number of the articles, or in their value, is immaterial, provided the value proved be sufficient to constitute the offence at law. So, if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more of a sufficient value, it will be sufficient, although he fail in his proof of the rest. But where value is essential to constitute the offence, and the value is ascribed in the indictment to many articles collectively, the offence must be made out as to all the articles; for the grand jury have ascribed the value to all the articles collectively. *R.* v. *Forsyth*, *R. & R.* 274. Although, to make a thing the subject of larceny, it must be of *some* value, and be so stated in the indictment, yet it need not be of the value of some coin known to the law, *i. e.* of a farthing at the least. *Reg.* v. *Morris*, 9 *C. & P.* 349.

Money is described as so many pieces of the current gold or silver coin of the realm, called ———. The species of coin must be specified. *R.* v. *Fry*, *R. & R.* 482. *See R.* v. *Warshaner*, 1 *Mood. C. C.* 466.

Besides what we have hitherto said relative to the certainty required in the statement of an offence in an indictment, it is necessary to add, that, in an indictment for murder, the word *murdravit*, *Dy.* 261 *a*, in an indictment for rape the word *rapuit*, *Staund.* 26 *a*, and in an indictment for larceny the words *felonice cepit et asportavit*, 4 *Bl. Com.* 305, are absolutely necessary; they are technical words essential to the definition of the offence, without which these offences respectively cannot be described upon the record: and if omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The words "*vi et armis*," though usual in indictments for offences against the person, are not essential. 37 *H.* 8, *c.* 8; 7 *G.* 4, *c.* 64, *s.* 20.

The intention of the party at the time he committed the offence is often a necessary ingredient in it; and in such cases it is as necessary to state the intention in the indictment, as any other of the facts and circumstances which constitute the offence. *See R.* v. *Phillips*, 6 *East*, 454. (*See post*, *Part* 2, *Ch.* 1). In some cases, the law has adopted certain technical expressions to indicate the intention with which an offence is committed; and in such cases the intention must be expressed by the technical word prescribed, and no other. Thus, treason must be laid to have been done "*traitorously*;" all felonies to have been done "*feloniously*:" burglary is laid to have been done "*feloniously and burglariously*," and with intent to commit a particular felony; murder, "*feloniously* and *of his malice aforethought*;" 2 *Hale*, 184, 187; forgery, "*feloniously*," if made felony by statute, and with intent to defraud, &c.

*Where a statute annexes a higher degree of punishment to a common-law felony*, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. 2 *Hale*, 170.

Lastly, as to indictments for offences created by statute: the statute contains a definition of the offence; and the offence consists of the commission or omission of certain acts, under certain circumstances, and in some cases with a particular intent. An indictment, therefore, for an offence against the statute, must with certainty and precision, charge the defendant to have committed or omitted the acts, under the circumstances and with the intent mentioned in the statute; and if any one of these ingredients in the offence be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict; *see Lee* v. *Clarke*, 2 *East*, 333; nor will the conclusion *contra formam statuti* cure it. 2 *Hale*, 170. *And see R.* v. *Jukes*, 8 *T. R.* 536: *Com. Dig.*, *Information*, (*D.* 3). But if the indictment describe the offence in the words of the statute, after verdict it will be sufficient in all offences created or subjected to any greater degree of punishment by any statute. 7 *G.* 4, *c.* 64, *s.* 21. *See R.* v. *Warshaner*, 1 *Mood. C. C.* 466. In an indictment upon the repealed stat. 5 *El. c.* 11, *s.* 2, (which makes it high treason to clip, round, or file any of the coin of the realm, "for wicked lucre or gain's sake"), it was necessary to charge the offence to have been committed for the sake of wicked lucre or gain, otherwise it would be bad. 1 *Hale*, 220. So, an indictment on that part of the Black Act, (now repealed), which made it felony "*wilfully and maliciously*" to shoot at any person in a dwelling-house or other place, was holden bad, because it charged the offence to have been done "*unlawfully and maliciously*," omitting the word "wilfully;" *R.* v. *Davis*, 1 *Leach*, 556; some of the judges, indeed, thought that "maliciously" included "wilfully;" but the greater number held, that as "wilfully" *and* "maliciously" were both mentioned in the statute as descriptive of the offence, both must be stated in the indictment. So, an indictment upon stat. 7 *&* 8 *G.* 4, *c.* 30, *s.* 2, for feloniously, voluntarily, and maliciously setting fire to a barn, was holden bad, because the words of the statute are "*unlawfully* and maliciously." *R.* v. *Turner*, 1 *Mood. C. C.* 239. So, an indictment upon stat. 9 *G.* 4, *c.* 31, *s.* 12, charging the prisoner with "feloniously, wilfully and maliciously cutting," &c., is not sufficient, the words of the statute being "*unlawfully* and maliciously." *Reg.* v. *Ryan*, 2 *Mood. C. C.* 15. So, where an indictment on the repealed stats. 15 *G.* 2, *c.* 34, and 14 *G.* 2, *c.* 6, which made it felony without benefit of clergy to steal any cow, ox, heifer, &c., charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was holden to be a fatal variance; for the statute having mentioned both cow and heifer, proved that the words were not considered by the legislature as synonymous. *R.* v. *Coke*, 2 *East*, *P. C.* 617; 1 *Leach*, 123. *See also R.* v. *Douglas*, 1 *Camp.* 212. So, where an indictment charged in one count that the defendant did break *to get* out, and in another that he did break *and get* out, it was holden insufficient, because the words of the statute are "break out." *R.* v. *Compton*, 7 *C. & P.* 139. In like manner it was decided, that, as the repealed stat. 15 *G.* 2, *c.* 34, specified lambs as well as sheep, a defendant could not be convicted

for stealing sheep upon an indictment for stealing lambs; *R.* v. *Loom*, 1 *Mood. C. C.* 160; and a similar construction has been put upon the stat. 7 & 8 *G.* 4, *c.* 29, *s.* 25. *R.* v. *Puddifoot*, 1 *Mood. C. C.* 247. But in *Reg* v. *M'Culley*, 2 *Mood. C.C.* 34, an indictment under that statute for killing a sheep, with intent to steal the carcase, was held to be supported by proof of killing a ram or ewe, the words of the statute being "ram, ewe, sheep, or lamb;" a majority of the judges considering "sheep" a generic term, including the former words. *See also Reg.* v. *Spicer*, 1 *C & K.* 699. Where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. As, for instance, if the word "*knowingly*" be in the statute, and the word "*advisedly*" be substituted for it in the indictment, *R.* v. *Fuller*, 1 *B. & P.* 180, or the word "*wilfully*" in the statute, and "*maliciously*" in the indictment, (the words "*advisedly*" and "*maliciously*" not being in the statutes respectively), the indictment would be sufficient. It is much better, however, to pursue strictly the words of the statute, as it precludes all question about the meaning of the expressions used; besides, the court, *in favorem vitæ*, are sometimes inclined to listen to and countenance very nice distinctions upon the subject. Thus, an indictment upon the repealed stat. 2 *G.* 2, *c.* 25, (which made the stealing of "bank-notes" felony), charging the defendant with stealing "a certain note *commonly called* a bank-note," was holden bad, because it did not follow the description of property in the statute. *R.* v. *Craven*, *R. & R.* 14; 2 *East, P. C.* 601, 602. So, under the repealed stat. 2 & 3 *Ed.* 6, *c.* 33, which contained only the words "horse, gelding, or mare," upon an indictment for stealing two colts, the judges were unanimously of opinion that, as colts were not mentioned *eo nomine* in the statute, they could not take notice that they were of the horse species; *R.* v. *Beaney*, *R. & R.* 416; although upon the same statute it was decided that an indictment for stealing "a mare" was proved by evidence of stealing a filly. *R.* v. *Welland*, *R. & R.* 494. *See also R.* v. *Chard*, *R. & R.* 488, *and the cases above mentioned.* And pursuing the words in the statute is sufficient, unless indeed they are generic terms, in which case it is necessary to state the species, according to the truth of the case. Thus, in an indictment on stat. 37 *G.* 3, *c.* 70, making it felony to endeavour to seduce a soldier or sailor from his duty, it is sufficient to charge an *endeavour*, *&c.*, without specifying the means employed. *R.* v. *Fuller*, 1 *B. & P.* 180. But where a statute (for instance) makes the maliciously killing of cattle a felony, it is not sufficient in an indictment on the statute to charge the defendant with killing "cattle" generally, but the species of cattle, as horse, mare, gelding, cow, heifer, ox, &c., must be stated. *R.* v. *Chalkley*, *R. & R.* 258. And where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it; as, for instance, where, by the usage of a public office, the bare signature of a party upon a navy bill operates as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged "a certain receipt for money; to wit, the sum of 25*l.* mentioned and contained in the said paper called a

navy bill, which forged receipt was as follows, that is to say,—*William Thornton, William Hunter,*" was holden bad, because it did not shew by proper averments that these signatures imported a receipt. *R.* v. *Hunter*, 2 *Leach*, 624; 2 *East, P. C.* 928. *See R.* v. *Barton*, 1 *Mood. C. C.* 141. In like manner it was holden that an indictment for forging the word "*settled*" at the bottom of a bill, must shew by proper averments that it is a receipt. *R.* v. *Thompson*, 2 *Leach*, 910. *See Reg.* v. *Boardman*, 2 *M. & Rob.* 147. By stat. 7 *G.* 4, *c.* 64, *s.* 21, no objection can be taken after verdict to any indictment for any offence created or subjected to any greater degree of punishment by statute, if the indictment follow the words of the statute. It is still, however, necessary, as in the two cases last above cited, to aver such facts and circumstances as are necessary to bring the case within the operation of the particular statute upon which the indictment is founded. The statute itself need not be recited.

If there be any exception contained in the same clause of the act which creates the offence, the indictment must shew, negatively, that the defendant or the subject of the indictment does not come within the exception. *Spiers* v. *Parker*, 1 *T. R.* 141: *R.* v. *Earnshaw*, 15 *East*, 456: *Rex* v. *Jarvis*, 1 *East*, 643: *R.* v. *Batten*, 6 *T. R.* 559. *And see R.* v. *Baxter*, 5 *T. R.* 83; *Leach*, 580; 2 *East, P. C.* 782: *R.* v. *Masters*, 1 *B & Ald.* 362: *R.* v. *Pearce*, *R. & R.* 174: *R.* v. *Robinson*, *Id.* 321. If, however, the exception or proviso be in a subsequent clause or statute, *R.* v. *Hall*, 1 *T. R.* 320, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, *Steel* v. *Smith*, 1 *B. & Ald.* 94, it is in that case matter of defence for the other party, and need not be negatived in the pleading.

As to the proper mode of stating the title &c. of a statute in pleading, *see Reg.* v. *Biers*, 1 *Ad. & E.* 327: *Gibbs* v. *Pike*, 8 *M. & W.* 223: *Beck* v. *Beverley*, 11 *M. & W.* 845.

Before we conclude this part of our subject, it may be necessary to observe, that no part of the indictment must be in figures; and, therefore, numbers, dates, &c., must be stated in words at length. 2 *Hale*, 170. The only exception to this is, where a *fac simile* of a written instrument is to be set out, as was formerly the case in an indictment for forgery; in which case, it must be set out in the indictment in words and figures, as in the original itself. *R.* v. *Mason*, 1 *East*, 180.

In conclusion, if all the ingredients of the offence (whether it be an offence at common law or one created by statute) be not set forth in the indictment, or if any of them be not stated with sufficient certainty, the defendant may demur, move in arrest of judgment, or bring a writ of error. *See R.* v. *Mason*, 2 *T. R.* 581. But in offences created by statute, or subjected to a greater degree of punishment by any statute, (although the defendant may demur, if the indictment do not describe the offence with sufficient certainty), he cannot, if it describe the offence in the words of the statute, move in arrest of judgment, or bring a writ of error; for, after verdict, the indictment will, in that case, be sufficient to warrant the punishment. 7 *G.* 4, *c.* 64, *s.* 21. It may be necessary, also, to mention in this place, that no objection can now be taken to any indictment, for that the matters alleged, or the persons described in it, do not correspond in number or gender with the description in the statute upon which the indictment is framed; for whenever any statute re-

lating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence, or the subject-matter on or with respect to which it shall be committed, hath used or shall use words importing the singular number or the masculine gender only, yet the statute shall be understood to include several matters, several persons, females and males, bodies corporate and individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction. 7 & 8 *G.* 4, *c.* 28, *s.* 14. On the other hand, if the offence be well laid, but there be a material variance between the offence as laid, and the evidence offered to support it, the defendant must be acquitted.

*It must not be double.*]—The defendant must not be charged with having committed two or more offences in any one count of the indictment; for instance, one count cannot charge the defendant with having committed a murder and a robbery, or the like. So, two defendants cannot be jointly charged with murder or manslaughter by means of an injury done by one of them to the deceased on one day, and another injury done by the other of them on a different day. *Reg.* v. *Devett*, 8 *C.* & *P.* 639. The only exceptions to this rule are to be found in indictments for burglary, in which it is usual to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended; and in indictments for embezzlement by clerks and servants, (or public officers, 2 *W.* 4, *c.* 4, *s.* 3), which may charge any number of distinct acts of embezzlement, not exceeding three, which may have been committed against the same master within six months inclusive. 7 & 8 *G.* 4, *c.* 29, *s.* 48. The proper course under this statute is to charge the several acts in several counts. *Reg.* v. *Purchase*, *C.* & *Mar.* 617. Laying several overt acts in a count for high treason is not duplicity, *Kelynge*, 8, because the charge consists of the compassing, &c., and the overt acts are merely evidences of it; and the same as to conspiracy. That the defendant published and caused to be published a libel is not double, for they are the same offence. So, a count in an indictment charging a man with one endeavour to procure the commission of two offences, is not bad for duplicity, because the endeavour is the offence charged. *R.* v. *Fuller*, 1 *B.* & *P.* 181. And it is now generally understood, that a man may be indicted for the battery of two or more persons in the same count, *R.* v. *Benfield*, 2 *Bur.* 984: *see* 2 *Str.* 890; 2 *Ld. Raym.* 1572, *contra*, or for a libel upon two or more persons, where the publication is one single act, *R.* v. *Jenner*, 7 *Mod.* 400; 2 *Burr.* 983, without rendering the count bad for duplicity. In felonies also, the indictment may charge the defendant, in the same count, with felonious acts with respect to several persons—as, in robbery, with having assaulted A. & B., and stolen from A. one shilling, and from B. two shillings—if it was all one transaction. *Reg.* v. *Giddins*, *C.* & *Mar.* 694.

In civil actions, the usual mode of objecting to pleadings for duplicity is by special demurrer; it is cured by general demurrer, or by the defendant's pleading over. In criminal cases, the defendant may object to it by special demurrer, perhaps also upon general demurrer, or the court in general, upon application, will quash the indictment; but it is extremely doubtful whether it can be made the subject of a motion in arrest of judgment or of a writ of error; and it is cured by a verdict of guilty as to one of the offences, and not guilty as to the other.

*It must be positive.*]—Every fact and circumstance stated in an indictment must be laid positively, that is, the indictment must directly affirm that the defendant did so and so, or that such a fact happened under such and such circumstances; it cannot be stated by way of recital, "*that whereas*," &c., or the like. 2 *Hawk. c.* 25, *s.* 60. *R.* v. *Whitehead*, 1 *Salk.* 371: *R.* v. *Crowhurst*, 2 *Ld. Raym.* 1363; 1 *Show.* 337: *R.* v. *Askman*, 1 *Sess. Ca.* 159. As, for instance, where an indictment for not obeying a justice's order set forth the order by way of recital, "*that whereas a certain order*," &c., although it charged the not obeying the order positively, it was holden bad. *R.* v. *Crowhurst*, 2 *Ld. Raym.* 1363. So, stating a matter by way of argument or inference would render the indictment bad; as, for instance, that by a certain indenture *testatum existit* that J. S. demised, &c.; and this, perhaps, even in mere matter of inducement, although in one case the contrary certainly has been decided. *R.* v. *Goddard*, 3 *Salk.* 171.

A defect in these respects is not cured by verdict; and consequently the defendant may take advantage of it by demurrer, motion in arrest of judgment, or writ of error.

*It must not be repugnant.*]—Where one material part of an indictment is repugnant to another, the whole is void; as, for instance, an indictment charging the defendant with forging a bond by which J. S. was *bound*, &c. (which is impossible if the writing be forged); or with *disseising* A., and it appears upon the face of the indictment that A. had but an estate for years; 2 *Hawk. c.* 25, *s.* 62; with stealing the goods of the *said* J. S., where the name of J. S. was not previously mentioned; *Id. s.* 72; or in the parish *aforesaid*, where no parish was before mentioned; (*ante, p.* 39); for forging a bill of exchange, stating it to be *signed* by the party whose signature was alleged to be forged; *R.* v. *Carter*, 2 *East, P. C.* 985; or the like. If the repugnancy be in an immaterial part, it may in general be rejected as surplusage, especially after verdict. *Bac. Abr., Pleas*, (14). Thus, upon an indictment *tempore* 1 *G.* 4, for stealing a mare in the fourth year of the reign of *G.* 4, against the peace of our lord the now king, the words "fourth year of the" may be rejected as surplusage. *R.* v. *Gill*, *R. & R.* 431. But still it is a general rule, that an allegation in pleading, which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, however inconsistent it may be with an allegation subsequent. *R.* v. *Stevens*, 5 *East*, 244.

*Averments, how made.*]—The usual way of making an averment in an indictment is thus: "*And the jurors aforesaid upon their oath aforesaid, do further present, that*," &c.; or, if it be connected with what has immediately preceded it, it may be introduced simply thus: "*And that*," &c., then proceeding to state the matter of the averment. But when the matter of the averment is but a mere adjunct of some person or thing preceding, it does not require even this technical mode of introducing it; thus, "that A. *being* an officer," &c., is a sufficient averment that A. was an officer; *see R.* v. *Johnson*, 2 *Rol. Rep.* 226: *R.* v. *Boyall*, 2 *Burr.* 832: *R.* v. *Bootie*, *Id.* 864: *R.* v. *Higgins*, *Id.* 1232: *R.* v. *Somerton*, 7 *B. & C.* 463: 2 *Hawk. c.* 25, *s.* 112; "that A., *knowing* that B. was indicted for forgery, concealed a witness against him," is a sufficient averment that B. was indicted; *Fitzg.* 122, 263; so, "*dans* plagam mortalem," *R.* v. *Long*, 5 *Co.* 120; *March*, pl. 127, or "*sciens*

that," &c., *R.* v. *Lawley*, 2 *Str.* 904, is a good averment. So, where an indictment for perjury stated that "at and upon the hearing of the said complaint," the defendant deposed, &c., this was holden to be a sufficient averment that the complaint was heard. *R.* v. *Aylett*, 1 *T. R.* 70.

### 3. *Conclusion of the Indictment.*

*For an offence at common law.*]—An indictment for an offence at common law concludes thus: "*Against the peace of our lady the Queen, her crown and dignity.*" Indictments for nuisance usually conclude, "to the great damage and common nuisance of all the liege subjects of our said lady the Queen," &c., as well as "against the peace," &c.; but this conclusion, *ad commune nocumentum*, does not seem to be essential.

The words "against the peace of our lady the Queen," however, seem to be essential in all cases, 2 *Hale*, 188: *R.* v. *Paffrey*, *Cro. Jac.* 527: *R.* v. *Leyton*, *Cro. Car.* 584: *R.* v. *Lane*, 6 *Mod.* 128: *R.* v. *Cook*, *R. & R.* 176, excepting in indictments for nonfeasance; *R.* v. *Wyatt*, 1 *Salk.* 381; 1 *Vent.* 108, 111; and even in these they are uniformly used: "against the peace," without saying "of our lady the Queen," would be insufficient. 2 *Hale*, 188. If the offence were committed in the reign of the late King, the indictment should conclude, "against the peace of our lord the *late* King," &c.; if "of our lord the King," or "of our lord the now King," it would be bad; 2 *Hale*, 189; and formerly the defendant might have moved in arrest of judgment, *R.* v. *Lookup*, 3 *Burr.* 1901: *R.* v. *Taylor*, 5 *D. & R.* 422, or brought a writ of error. *Contra pacem nuper regis et regis nunc*, might answer in such a case, *R.* v. *Winter*, *Yelv.* 66, because the words "*et regis nunc*" might be rejected as surplusage. On the other hand, if an offence (as, for instance, a nuisance) commence in the reign of one king, and still continue in the reign of his successor, the indictment should properly conclude against the peace of both. 2 *Hale*, 189. If an indictment allege the offence to have been committed in the present reign, and conclude "against the peace of our said *late* lord the King," the word "late" may be rejected as surplusage. *R.* v. *Scott*, *R. & R.* 415.

By 7 *G.* 4, *c.* 64, *s.* 20, no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the words "against the peace." A conclusion "against the peace of the present King," for an offence in the reign of the late King, is cured by this statute; for it is the same as if no conclusion had been stated, *R.* v. *Chalmers*, 1 *Mood. C. C.* 352; 5 *C. & P.* 331, and therefore the only mode in which such an objection can now be taken is by demurrer. *Reg.* v. *W. Smith*, 2 *M. & Rob.* 109. But an indictment charging an offence on a day within the present reign, and concluding against the peace of the present King, is not supported by proof of an offence on a day in a former reign; and this objection still entitles the prisoner to an acquittal. *Reg.* v. *Pringle*, *Id.* 276.

The words "her crown and dignity," though always used, are not essential. 2 *Hale*, 188.

*For an offence by statute.*]—An indictment for an offence created by statute concludes thus: "*Against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.*"

Where a statute either creates the offence altogether, or makes an offence at common law an offence of a higher nature, (as, for instance, where it makes a misdemeanor a felony), an indictment for the offence must conclude *contra formam statuti.* 2 *Hale*, 192; 2 *Hawk. c.* 25, *s.* 116; *R.* v. *Clark*, 1 *Salk.* 370: *R.* v. *Harrison*, 2 *Rol. Rep.* 38. If the statute do not make it an offence of a higher nature, but merely increase or otherwise alter the punishment, &c., (as, for instance, perjury under stat. 5 *El. c.* 9), the indictment, in order to bring the offence within the statute, must conclude *contra formam statuti; (sed quære, Reg.* v. *Williams, Q. B., E. T.* 1845); but if it do not so conclude, it may still be a good indictment for the offence at common law. 2 *Hale*, 191, 192. Or if the statute be merely declaratory of an offence at common law, (as high treason, for instance), without adding to or altering the punishment, &c, an indictment for the offence may conclude *contra formam statuti*, or as at common law. 2 *Hale*, 189.

But where a statute merely takes away a certain privilege or benefit from a person committing a common-law offence under particular circumstances, to which benefit or privilege the defendant would have been entitled at common law, as for instance, where it takes away the benefit of clergy from a common-law felony, an indictment for the offence, although it must charge it to have been committed under the circumstances mentioned in the statute, should not conclude *contra formam statuti.* 2 *Hale*, 190. Thus, indictments for murder, manslaughter, robbery, burglary, house-breaking, stealing in a dwelling-house, and the like, need not conclude *contra formam statuti; Ib.;* unless, in the latter instances, a larceny be committed of a thing which at common law was not the subject of larceny. *R.* v. *Pearson*, 1 *Mood. C. C.* 13; 5 *C. & P.* 121: *R.* v. *Chatburn*, 1 *Mood. C. C.* 403: *R.* v. *Lucy Berry*, 1 *M. & Rob.* 463: *Reg.* v. *Polly*, 1 *C. & K.* 77. In order to warrant a sentence of transportation for life on an indictment for larceny after a previous conviction for felony, the indictment need not conclude *contra formam statuti. Reg.* v. *Blea*, 8 *C. & P.* 735.

Where one statute is relative to another, as where one creates the offence and the other the penalty, an indictment for the offence must conclude *contra formam statutorum.* 2 *Hale*, 173; *Broughton* v. *Moore, Cro. Jac.* 142. So, where one statute declares the offence and awards a punishment, and by a subsequent statute the punishment is altered, the indictment should conclude *contra formam statutorum. Reg.* v. *Adams*, 1 *C. & Mar.* 299. But if one statute subject an offence to a pecuniary penalty, and a subsequent statute make it a felony, an indictment for the felony should conclude *contra formam statuti. R.* v. *Pim, R. & R.* 425. Where the offence is prohibited by several independent statutes, the indictment may conclude *contra formam statutorum*, or *statuti.* 2 *Hawk. c.* 25, *s.* 117. If the statute creating the offence be temporary, and be continued or made perpetual by another statute, an indictment for the offence may conclude *contra formam statuti:* 2 *Hale*, 173; *Dingley* v. *Moor, Cro. El.* 750: *R.* v. *Morgan*, 2 *Str.* 1066; but where a former statute is discontinued, and revived by a subsequent one, Lord *Hale* says, that it is safer in such a case to conclude *contra formam statutorum*, although, according to good authorities, *contra formam statuti* would be sufficient. 2 *Hale*, 173. An indictment for a common-law felony, committed abroad, but made triable in this country by statute, need not conclude *contra formam statuti. R.* v. *Sawyer, R. & R.* 294.

Omitting to conclude *contra formam statuti*, when it is essential,

is error, and may be made the subject of demurrer, motion in arrest of judgment, or writ of error; for this is not cured by the stat. 7 *G.* 4, *c.* 64, *s.* 20. *R.* v. *Pearson*, 1 *Mood. C. C.* 313: *R.* v. *Radcliffe*, 2 *Mood. C. C.* 68. So, concluding *contra formam statuti* for *statutorum*, or the contrary, may be made the subject of a demurrer; but no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or *vice versâ*. 7 *G.* 4, *c.* 64, *s.* 20. If an indictment conclude *contra formam statuti*, when it should conclude as at common law, the mistake is not material, and the words *contra formam statuti*, may be rejected as surplusage. *R.* v. *Matthews*, 5 *T. R.* 162: *R.* v. *Bathurst*, *Say.* 225: *Ward* v. *Rich*, 1 *Vent.* 103.

The conclusion, *contra formam statuti*, will not supply the omission of the words "against the peace," &c., *R.* v. *Cook*, *R.* & *R.* 176, which, in an indictment founded upon a statute, besides the words *contra formam statuti*, are absolutely necessary. 2 *Hale*, 188. If these words be omitted, the defendant may demur, but he cannot, upon that ground, move in arrest of judgment, or bring a writ of error. 7 *G.* 4, *c.* 64, *s.* 20; *Reg.* v. *W. Smith*, 2 *M.* & *Rob.* 109.

## Sect. 4.

### JOINDER OF TWO OR MORE DEFENDANTS IN ONE INDICTMENT.

Where several persons join in the commission of an offence, all, or any number of them, may be jointly indicted for it, or each of them may be indicted separately. Thus, if several commit a robbery, burglary, or murder, they may be indicted for it jointly, 2 *Hale*, 173, or separately; and the same, where two or more commit a battery, or are guilty of extortion, or the like. *R.* v. *Atkinson*, 1 *Salk.* 382. And though they have acted separately, yet, if the grievance is the result of the acts of all jointly, all may be indicted jointly for the offence. *R.* v. *Trafford*, 1 *B.* & *Ad.* 874. Where money has been obtained under false pretences, and the false pretences were conveyed by words spoken by one defendant in the presence of the others, all of whom acted in concert together, it was holden that they might all be indicted jointly. *R.* v. *Young*, 3 *T. R.* 98. So, where two persons joined in singing a libellous song, it was holden that they might be indicted jointly; *R.* v. *Benfield*, 2 *Burr.* 985; and the same, where two or more persons join in any other kind of publication of a libel. But if the publication of each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately. So, two or more cannot be jointly indicted for perjury, *R.* v. *Phillips*, 2 *Str.* 921, or for seditious or blasphemous words, or the like, because such offences are in their nature several. Even where several commit a joint act, which act, however, is not of itself illegal, but becomes so merely by reason of some circumstances applicable to each individual severally and not jointly, they must be indicted separately; 2 *Hawk. c.* 25, *s.* 89; thus, several partners cannot be indicted jointly for exercising their trade without having served an apprenticeship. *R.* v. *Atkinson*, 1 *Salk.* 382: *R.* v. *Weston*, 2 *Str.* 623. But principals in the first and second degree, and accessaries before and after the fact, may all be joined in the same indictment; 2 *Hale*, 173;

or the principals may be indicted first, and the accessaries after the conviction of the principals, or before, for a substantive offence. (*See ante, p.* 8). It is said that several may be jointly indicted for severally erecting common inns, *ad commune nocumentum*, if it be said, that they *separaliter erexerunt*, &c.; and the same as to keeping disorderly houses, &c.: *Ib.*: but it is much better, and more usual in practice, to indict the proprietors of each house separately.

Misjoinder of defendants may be made the subject of a demurrer, motion in arrest of judgment, or writ of error; or the court will in general quash the indictment. But where there are different counts against different persons in the same indictment, this, though a ground for moving to quash the indictment, is, it seems, no cause of demurrer, *R.* v. *Kingston*, 8 *East*, 41, provided the counts be otherwise such in substance as may be joined.

Upon an indictment against two persons, charging them with a joint and single offence, as stealing in the dwelling-house, both or either may be found guilty, but they cannot be found guilty of separate parts of the charge; and if they be found guilty separately, judgment cannot be passed upon one, unless a pardon be obtained, or a *nolle prosequi* be entered, as to the other. *R.* v. *Hempstead*, *R.* & *R.* 344. So, if two be charged jointly with receiving stolen goods, a joint act of receiving must be proved: proof that one received in the absence of the other, and afterwards delivered to him, will not suffice. *R.* v. *Messingham*, 1 *Mood. C. C.* 257. It seems that several receivers may be charged in the same indictment with separate and distinct acts of receiving: *Reg.* v. *Pulham*, 9 *C.* & *P.* 281, (*ante, p.* 8): at least it is too late after verdict to object that they should have been indicted separately. *Reg.* v. *Hayes*, 2 *M.* & *Rob.* 156. Where several persons are indicted for burglary and larceny, one may be found guilty of burglary and larceny, and the others of the larceny only. *R.* v. *Butterworth*, *R.* & *R.* 520. *See R.* v. *Turner*, 1 *Sid.* 171.

## Sect. 5.

### JOINDER OF SEVERAL OFFENCES IN DIFFERENT COUNTS IN ONE INDICTMENT.

We have already seen, (*ante, p.* 53), that if a defendant be charged with two or more offences in the same count of an indictment, the count will be bad for duplicity, except in one or two excepted cases. As to charging a defendant with different offences in different counts, it admits of a different consideration.

In an indictment for high treason, there may be different counts, each charging the defendant with different species of treason against the Queen and her government, such as compassing the Queen's death, levying war, adhering to the Queen's enemies, within stat. 25 *Ed.* 3, *st.* 5, *c.* 2, and the conspiracies to levy war, within stat. 36 *G.* 3, *c.* 7, *s.* 1; but you cannot join counts for treason against the Queen and her government, and treasons relating to other matters, where the judgments are different; at least I have never known or read of an instance of the kind.

A defendant ought not to be charged with different felonies in different counts of an indictment; as, for instance, a murder in one count and a burglary in another, or a burglary in the house of A. in one count and a distinct burglary in the house of B. in another, or

a larceny of the goods of A. in one count and a distinct larceny of the goods of B., at a different time, in another. If the objection in such a case be made before the defendant has pleaded, or the jury are charged, the judge in his discretion may quash the indictment; or if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed; *R.* v. *Young*, 3 *T.R.* 106; but it is no objection in arrest of judgment. 3 *T. R.* 98: *see Reg.* v. *Hinley*, 2 *M. & Rob.* 524: *O'Connell* v. *Reg.*, 11 *Cla. & Fin.* 155. Thus, upon an indictment for receiving stolen goods, if it appear that the articles were received at different times, the prosecutor must elect as to the receipt of which articles he will prosecute; but the mere probability that the goods were stolen or received at different times is no ground for putting the prosecutor to his election. *R.* v. *Dunn*, 1 *Mood. C. C.* 146: *Reg.* v. *Hinley*, *suprà*. Where several articles are mentioned in the indictment, the prosecutor must prove that they were all taken at the same time, or if at several times, so near to each other as to form parts of one continuing transaction, otherwise the court will put the prosecutor to his election. *R.* v. *Smith*, 1 *Mood. C. C.* 295: *see R.* v. *Ellis*, 6 *B. & C.* 145. So, upon an indictment for robbery, and for an assault with intent, &c., in different counts, the prosecutor must elect upon which he will proceed. *R.* v. *Gough*, 2 *M. & Rob.* 71: *R.* v. *Smith*, 3 *C. & P.* 412. Where, however, the defendant was indicted under the stat. 7 *W.* 4 & 1 *Vict. c.* 85, *ss.* 2, 4, in several counts for stabbing, with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was holden, that the prosecutor was not bound to elect upon which count he would proceed, notwithstanding the judgment is by the statute different, being on the first count capital, and on the others transportation. *Reg.* v. *Strange*, 8 *C. & P.* 172. And where to those counts was added a count for a common assault, and the prisoner being found guilty of an assault, the verdict was entered on the count for stabbing with intent to do grievous bodily harm, under 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, the conviction was held good. *Reg.* v. *R. Jones*, 2 *Mood. C. C.* 94; 8 *C. & P.* 776. In a case of arson, the indictment contained five counts, each charging a firing of a house of a different owner: but it being opened that the five houses were in a row, and the same fire burnt them all, the judge would not put the prosecutor to elect, it being all one transaction. *Reg.* v. *Trueman*, 8 *C. & P.* 727. The application for a prosecutor to elect is an application to the *discretion* of the judge, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defence. *Id.* *Reg.* v. *Hinley*, 2 *M. & Rob.* 524. It is no objection, in point of law, that an indictment charges prisoners in one count as principals in stealing, and in another as receivers; but, upon a case reserved, the judges were divided in opinion, whether the prosecutor should have been put to his election, and directed that both charges should not, for the future, be put in the same indictment. *R.* v. *Galloway*, 1 *Mood. C. C.* 234: *R.* v. *Flower*, 3 *C. & P.* 413: *R.* v. *Madden*, 1 *Mood. C. C.* 277. A defendant may be charged as accessary before the fact in one count, and as accessary after the fact in another count, to the same felony, without putting the prosecutor to his election, and may be convicted on both counts. *R.* v. *Blackston*, 8 *C. & P.* 43. So he may be indicted as a principal in the first degree in one count, and as principal in the second degree in another count. *R.* v. *Gray*, 7 *C. & P.* 174. And a receiver may

be indicted as an accessary in one count, and for a substantive felony in another count; and although, in his discretion, the judge may put the prosecutor to his election, he will not do so whenever it is clear that there is only one offence, and the joinder of counts cannot prejudice the defendant. *R.* v. *Austin*, 7 *C. & P.* 796: *R.* v. *Hartall*, *Id.* 475: *R.* v. *Wheeler*, *Id.* 170: *Reg.* v. *Pulham*, 9 *C. & P.* 281.

Although a prosecutor is not permitted to charge a defendant with different felonies in different counts, yet he may charge the same felony in different ways in several counts, in order to meet the facts of the case: as, for instance, if there be a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, be the goods or house of A. or of B., they may be stated in one count as the goods or house of A., and in another as the goods or house of B. *See R.* v. *Eggington*, 2 *B. & P.* 508.

The statute 7 & 8 *G.* 4, *c.* 28, *s.* 6, which abolishes the benefit of clergy in cases of felony, provides that nothing therein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of that act.

Indictments for misdemeanors may contain several counts for different offences, provided the judgment upon each be the same. *R.* v. *Young*, 3 *T. R.* 98, 106: *R.* v. *Towle*, 2 *Marsh*, 466: *R.* v. *Johnson*, 3 *M. & S.* 539: *R.* v. *Kingston*, 8 *East*, 46: *and see R.* v. *Benfield*, 2 *Burr.* 984: *R.* v. *Jones*, 2 *Camp.* 131. Even where several different persons were charged in different counts with offences of the same nature, the court held that it was no ground for a demurrer, however it might be for an application to the discretion of the court to quash the indictment. *R.* v. *Kingston*, 8 *East*, 41. Where two defendants were indicted for a conspiracy and a libel, and at the close of the case for the prosecution there was evidence against both as to the conspiracy, but against one only as to the libel, the judge then put the prosecutor to elect which charge he would proceed upon. *Reg.* v. *Murphy*, 8 *C. & P.* 297. If, however, where there are several counts charging different offences in law, the judgment be entered up generally upon all, that the defendant, "*for his said offences*," be adjudged, &c., and it appears that any count was bad in law, the judgment will be reversed on error. *O'Connell* v. *Reg.*, 11 *Cla. & Fin.* 155. To prevent this, it is now usual, in cases of misdemeanor, to pronounce and enter up the same judgment separately on each count of the indictment.

It may be necessary to mention, that the court will not order counts to be struck out of an indictment, as they will out of a declaration in civil cases; for the latter is the suggestion of the party merely, the former the finding of a grand jury. *R.* v. *Pewtress*, 2 *Str.* 1026.

The commencement of a second or subsequent count is in form thus: "*And the jurors aforesaid, upon their oath aforesaid, do further present, that,*" *&c.*, so proceeding to state the offence.

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## SECT. 6.

### WITHIN WHAT TIME THE BILL MUST BE PREFERRED.

AT common law there was no time limited for commencing a suit by the King; and therefore, in all cases of treason, felony, and mis-

demeanor, where a time is not now limited by statute, the indictment may be preferred at any length of time after the offence.

Indictments for such high treasons as cause corruption of blood, (with the exception of treason by "designing, endeavouring, or attempting any assassination of the King by poison or otherwise," 7 & 8 *W.* 3, *c.* 3, *s.* 6), must be found by the grand jury within three years next after the offence committed, if the offence have been committed within England, Wales, Berwick-upon-Tweed, 7 & 8 *W.* 3, *c.* 3, *s.* 5, or Scotland; *see Fost.* 249; but if committed on the high seas or in a foreign country, there is no time limited for the prosecution.

Prosecutions upon the stat. 1 *G.* 4, *c.* 1, to prevent the training of persons to the use of arms, and to the practice of military evolutions and exercise, must be commenced within six months after the offence. 1 *G.* 4, *c.* 1, *s.* 7.

Prosecutions by indictment upon the stat. 9 *G.* 4, *c.* 69, for offences relating to game, must be commenced within twelve calendar months after the commission of the offence.

Prosecutions by indictment or information upon the Smuggling Act, 8 & 9 *Vict. c.* 87, *s.* 134, must be commenced within three years.

By stat. 31 *Eliz. c.* 5, all indictments or informations upon any statute penal, whereby the forfeiture is limited to the King, must be brought within two years after the offence committed: if the forfeiture be limited to the King and prosecutor, the suit must be in one year; and in default thereof, the same must be sued for the King within two years after that year ended: but where a statute limits a shorter time, the suit must be brought within such time limited.

There are some few other cases in which a time is limited for commencing a prosecution, which shall be mentioned under their respective heads, in the course of the work.

In *R.* v. *Willice,* 1 *East, P. C.* 186, it was holden upon the repealed statutes relating to coin, that the information and proceeding before the magistrate, upon the defendant's being taken, was to be deemed the "commencement of the prosecution" within the meaning of those acts. So, where the warrant of commitment for the offence was within the time limited, but the indictment not till afterwards, this was held sufficient. *Reg.* v. *Austin,* 1 *C.* & *K.* 621. But proof by *parol* that the prisoner was apprehended for treason respecting the coin, within three months after the offence was committed, was holden not to be sufficient, where the indictment was after the three months, and the warrant to apprehend or to commit was not produced. *R.* v. *Philips, R.* & *R.* 369 In *R.* v. *Killminster,* 7 *C.* & *P.* 228, an indictment for night poaching was preferred against the defendant within twelve months after the commission of the offence, and was ignored; four years afterwards another bill was found against him for the same offence, and upon an objection that the proceeding was out of time, *Coleridge,* J., doubted whether the first indictment was not a proceeding sufficient to entitle the prosecutor to proceed: he reserved the point, but the defendant was acquitted upon the merits. *See also Tilladam* v. *Inhabitants of Bristol,* 4 *N.* & *M.* 144. The two first cases, though decided upon statutes now repealed, will be useful in the construction of statutes in which similar provisions occur.

## Sect. 7.

### INDICTMENT, HOW FOUND.

In ordinary cases, upon furnishing the clerk of the arraigns or clerk of the indictments at the assizes, or the clerk of the peace at sessions, with the particulars of the offence, he will draw the indictment; but in cases where more than ordinary care may be requisite in framing the indictment, it is better to get it drawn by counsel, and then let it be engrossed on plain parchment without stamp. Indorse on it the names of the witnesses intended to be examined before the grand jury.

As soon as the indictment is engrossed, the crier at the assizes, or the clerk of the peace at sessions, will administer the oath to the witnesses, which is absolutely necessary; (*see R.* v. *Dickinson, R. & R.* 401); and the proper officer will then lay the indictment before the grand jury.

Two indictments founded on the same case, one for a felony under a statute, and another for a misdemeanor at common law, ought not to be preferred at the same time. *See R.* v. *Doran*, 1 *Leach*, 538: *R.* v. *Smith*, 3 *C. & P.* 413. But the Court of Queen's Bench will not *quash* them in such a case. *Reg.* v. *Stockley*, 3 *Q. B.* 238; 2 *G. & D.* 728.

After the indictment has been taken to the grand jury room, it will come under the consideration of the grand jury in its turn. The witnesses are then called in, in the order in which their names are indorsed on the indictment, and examined by the grand jury; and if the offence should appear to a majority of the jury (consisting of twelve at least) to have been sufficiently proved, the clerk of the grand jury will indorse on the indictment, "*A true bill;*" but if the majority should be of opinion that the offence has not been sufficiently proved, the words, "*No true bill,*" are in that case indorsed on the indictment. Afterwards, the foreman, accompanied by the other grand jurors, carries the indictments so indorsed into court, and delivers them to the clerk of the arraigns, or clerk of the peace, who thereupon states to the court the substance of each, and the indorsement upon it.

In strict legal parlance, an indictment is not so called, until it has been found "*a true bill*" by the grand jury; before that it is named a bill merely.

The grand jury may require the same evidence, written and parol, as may be necessary to support the indictment at the trial. They are not, however, usually very strict as to the documentary evidence; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist on the same strictness of proof as must be observed at the trial, it is prudent in all cases to be provided, at the time the bill is preferred, with the same evidence with which you intend afterwards to support the indictment. It must be observed, however, that it is no objection that witnesses are called and examined at the trial, whose names are not on the back of the indictment; and that, in strictness, it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, although it is usual to do so, in order that the defendant may have the benefit of cross-examination; *R.* v. *Simmons*, 1 *C. & P.* 84: *R.* v. *Beezley*, 4 *C. & P.* 220: *Reg.* v.

*Vincent*, 9 *C. & P.* 91: *Reg.* v. *Bull*, *Id.* 22: and if the prosecutor will not call them, the judge, in his discretion, may. *R.* v. *Whitehead*, 4 *C. & P.* 322, *n.*: *Reg.* v. *Holden*, 8 *C. & P.* 610. It seems that an improper mode of swearing the witnesses before the grand jury will not vitiate the indictment, since they are at liberty to find a bill on their own knowledge merely. *Reg.* v. *Russell*, 1 *C. & Mar.* 247. *See O'Connell* v. *Reg.*, 11 *Cla. & Fin.* 155. A witness who gives false evidence before a grand jury is indictable for perjury, and the other witnesses examined on the same bill are good witnesses to prove it. *Reg.* v. *Hughes*, 1 *C. & K.* 519.

If witnesses will not come forward voluntarily to give evidence before the grand jury, you may sue out a *subpœna* or *subpœna duces tecum*, either at the crown office in London, or with the clerk of the arraigns in the country, for the assizes, or at the crown office, or with the clerk of the peace, for the sessions, and serve each of them with a copy, or *subpœna* ticket, as it is termed. Or, if the witness be in prison, he may be brought up by *habeas corpus ad testificandum*, to be sued out in the manner hereinafter mentioned, under the title *Evidence*.

The grand jurors of sessions of the peace must be qualified according to the stat. 6 *G.* 4, *c.* 50, *s.* 1; but grand jurors at the assizes require no qualification by estate; neither do grand jurors at *borough* sessions, since the 5 & 6 *W.* 4, *c.* 76, *s.* 121. They need not be freeholders; *R. & R.* 177; and even an Irish peer, who is a member of the House of Commons, is liable to serve upon the grand jury at the assizes as a commoner. *Id.* 117. They must, however, be of the king's liege people, returned by sheriffs or bailiffs of franchises, and of whom none shall be outlawed, or fled to sanctuary for treason or felony, otherwise the indictment shall be void; 11 *H.* 4, *c.* 9; and if any one be outlawed, the indictment is void, though twenty others be upon the inquest. 2 *Hale*, 202; *Com. Dig.*, *Indictment*, (A). In addition to this personal qualification of grand jurors at the assizes, the indictment was formerly declared to be void, if any of the grand jury were returned at the nomination of any; but that part of the stat. 11 *H.* 4, *c.* 9, is now repealed. 6 *G.* 4. *c.* 50, *s.* 62. The bill also must be found by a majority of the jurors, and that majority must consist of twelve at least; 2 *Hale*, 161; for which reason it is that the number of persons on the grand jury cannot exceed twenty-three, nor be less than twelve 2 *Burr.* 1088; *R.* v. *Marsh*, 6 *Ad. & Ell.* 241. It is said that the grand jury cannot find *billa vera* as to part, and *ignoramus* as to the other part, of an indictment; for they ought to find the whole or nothing. 2 *Hawk. c.* 25, *s.* 2; *R.* v. *Ford*, 1 *Yelv.* 99: *R.* v. *Serjeant*, 1 *Sid.* 414. Thus, if upon an indictment for libel, they find *quoad* the words *billa vera, sed utrum maliciose ignoramus*, the finding is void. 1 *Leon.* 287. But this has reference only to the same count in the indictment; for it is clear that they may find *billa vera* as to one count, and *ignoramus* as to another. *R.* v. *Fieldhouse*, *Cowp.* 325. They cannot, however, find the bill conditionally; as, for instance. "*si messuagium sit in possessione domini regis, tunc billa vera.*" *R.* v. *Cromwell*, *Yelv.* 15. Upon an indictment against A. and B., they cannot find *billa vera* as to A., and, as to B., manslaughter only; *R.* v. *Carew*, 1 *Rol. Rep.* 407; for if it were murder in A., it could not be merely manslaughter in B. But they might find *billa vera* as to A., and *ignoramus* as to B.; *see R.* v. *Chomley*, *Cro. Car.* 464; or they might find one or both of them

guilty of manslaughter, although, in such a case, it is more usual for the grand jury to return the indictment to the court, with a desire that it may be altered to a bill for manslaughter, and, when so altered, (which may readily be done), to find a true bill generally. Upon an indictment for murder, however, the jury cannot find *billa vera se defendendo; R.* v. *Powle*, 2 *Rol. Rep.* 52; for the offence charged is a felony, the offence found is not. *See* 9 *G.* 4, *c.* 31, *s.* 10.

Indictments found at the sessions, and transmitted by the justices to the assizes, must be tried at the assizes, although they be not removed by *certiorari. R.* v. *Wetherell, R. & R.* 381.

Although the grand jury have been formally discharged, yet if they have not left the precincts of the court, nor separated, they may be recalled and charged with other bills. *Reg.* v. *Holloway*, 9 *C. & P.* 43.

It may be necessary to mention, that if a bill be thrown out, although, as it seems, it cannot again be preferred to the same grand jury, during the same assizes or sessions, (*see Reg.* v. *Humphreys, C. & Mar.* 601; *sed quære, see Reg.* v. *Newton*, 2 *M. & Rob.* 503), it may be preferred and found at the next sessions or assizes, if no time be limited for preferring it, or if the time have not elapsed.

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## Sect. 8.

### INDICTMENT, IN WHAT CASES QUASHED.

*In what cases.*]—Where an indictment is so defective that no judgment can be given upon it, even should the defendant be convicted, the court, upon application, will in general quash it. Thus, for instance, they have quashed an indictment for perjury or forgery found at sessions, because the sessions have no jurisdiction of perjury or forgery; *R.* v. *Bainton*, 2 *Str.* 1088: *see R.* v. *Hewitt, R. & R.* 158: *Reg.* v. *Rigby*, 8 *C. & P.* 770; and an indictment against six for exercising a trade, because it was a distinct offence in each, and could not therefore be made the subject of a joint prosecution; *R.* v. *Tucker*, 4 *Burr.* 2046: *R.* v. *Weston*, 1 *Str.* 623: *and see R.* v. *Phillips, Id.* 921; and there are several instances where indictments have been quashed, because the facts stated in them did not amount to an offence punishable by law; *see R.* v. *Burket, Andr.* 230: *R.* v. *Sermon*, 1 *Burr.* 516, 543: *Reg.* v. *Philpotts*, 1 *C. & K.* 112; as, for instance, an indictment for contemptuous words spoken to a justice of peace, not stating that they were spoken to him whilst in the execution of his office. *R.* v. *Leafe, Andr.* 226.

Where the application is made upon the part of the defendant, the court have almost uniformly refused to quash an indictment, where it appeared to be for some enormous crime, such as treason or felony, *Com. Dig., Indictment*, (H): *and see R.* v. *Johnson*, 1 *Wils.* 325, forgery, perjury, or subornation. *R.* v. *Belton*, 1 *Salk.* 372; 1 *Sid.* 54; 1 *Vent.* 370: *R.* v. *Thomas*, 3 *D & R.* 621. They have also refused to quash indictments for cheating, *R.* v. *Orbell*, 6 *Mod.* 42, for selling flour by false weights, *R.* v. *Crookes*, 3 *Bur.* 1141, for extortion, *R.* v. *Wadsworth*, 5 *Mod.* 13, for not executing a magistrate's warrant, *R.* v. *Bailey*, 2 Str. 1211, against overseers for not paying money over to their successors, *R.* v. *King.* 2 *Str.* 1268, and the like. The court also will not quash indictments for not repairing highways or bridges, or for other public nuisances, *R.* v. *Belton*, 1 *Salk.* 372;

1 *Vent.* 370: *R.* v. *Bishop*, *Andr.* 220, unless there be a certificate that the nuisance is removed; *R.* v. *Layton*, *Cro. Car.* 584: *R.* v. *Wigg*, 2 *Salk.* 460; nor will they quash an indictment for a forcible entry, *R.* v. *Dyer*, 6 *Mod.* 96, unless, perhaps, where the possession has been afterwards given up. Also, where the alleged defect was that the indictment did not conclude *contra formam statuti*, the court refused to quash it. *R.* v. *Brotherton*, 1 *Str.* 702. *See Com. Dig.*, *Indictment*, (H); 3 *Bac. Abr.* 116.

But if the application be made on the part of the prosecution, the court will quash the indictment in all cases where it appears to be so defective that the defendant cannot be convicted on it, and where the prosecution appears to be *bonâ fide*, and not instituted from malicious motives, or for the purposes of oppression. If the prosecution be instituted by the attorney-general, an application to quash the indictment is never made upon the part of the prosecutor, because he may himself enter a *nolle prosequi*, which will have the same effect. *R.* v. *Stratton*, 1 *Doug.* 239, 240.

Where two indictments against the same defendant, one for felony and the other for misdemeanor, had been removed into the Court of Queen's Bench by *certiorari*, the court refused to quash them on an affidavit that they both related to the same transaction. *Reg.* v. *Stockley*, 3 *Q. B.* 238; 2 *G. & D.* 728.

*How.*]—The application to quash an indictment is made to the court where the bill is found; except in cases of indictments at sessions or in other inferior courts, in which cases the application has usually been made to the Court of Queen's Bench, the record being previously removed there by *certiorari*. It has now been decided, however, that the court of quarter sessions has itself authority to quash an indictment found there, before plea pleaded. *Reg.* v. *Wilson*, *Q. B.*, *M. T.* 1844.

Where the objection fully appears upon the record, no advantage can be taken of it at Nisi Prius. *R.* v. *Souter*, 2 *Stark. N. P. C.* 423.

The application, if made upon the part of the defendant, must be made before plea pleaded. *Fost.* 231; *R.* v. *Rookwood*, *Holt.* 684; 4 *St. Tr.* 677; and where the indictment had already, upon the application of the defendant, being removed into the Court of King's Bench by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment, after a forfeiture of his recognisance by not having carried the record down for trial. *Anon.*, 1 *Salk.* 380. But if the application be made upon the part of the prosecution, it should seem that it may be made at any time before the defendant has been actually tried upon the indictment. *See R.* v. *Webb*, 3 *Burr.* 1468. But after judgment for the prisoner on demurrer, the indictment cannot be quashed at the instance of the prosecutor. *Reg.* v. *W. Smith*, 2 *M. & Rob.* 109. Where the application is made to the Court of Queen's Bench, there is no objection to its being moved on the last day of the term; 1 *Burr.* 651; and the rule is absolute in the first instance, the defendant not having pleaded. *Reg.* v. *Stowell*, 1 *Dowl.*, *N. S.*, 320.

Before an application of this kind is made on the part of the prosecution, a new bill for the same offence must have been preferred against the defendant, and found. *R.* v. *Wynn*, 2 *East*, 226. And when the court, upon such an application, orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred

by reason of such former indictment; *R.* v. *Webb*, 3 *Burr.* 1469: *see Reg.* v. *Dunn*, 1 *C. & K.* 730; that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have done if it were not quashed; *R.* v. *Glen*, 3 *B. & Ald.* 373: *R.* v. *Webb*, 3 *Burr.* 1468; 1 *W. Bl.* 460; and (particularly where there has been any vexatious delay upon the part of the prosecutor, 3 *Burr.* 1468; 1 *W. Bl.* 460) that the name of the prosecutor be disclosed. *R.* v. *Glen*, 3 *B. & Ald.* 373.

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## Sect. 9.

### INDICTMENT, WHEN AND WHERE TRIED.

*When.*]—Indictments for felonies are tried at the same assizes or sessions at which they are preferred to and found by the grand jury. The trial, however, may be postponed until the next assizes or sessions at the instance of the prosecutor or the defendant shewing to the court by affidavit a sufficient cause for the delay, such as the unavoidable absence or illness of a necessary and material witness, the existence of a prejudice in the jury, and the like. *See R.* v. *Chevalier D'Eon*, 2 *Burr.* 1514: *R.* v. *Jolliffe*, 4 *T. R.* 285: *R.* v. *Morphew*, 2 *M. & Sel.* 602: *R.* v. *Hunter*, 3 *C. & P.* 591: *R.* v. *Streek*, 2 *C. & P.* 413: *R.* v. *Stevenson*, 2 *Leach*, 546: *Reg.* v. *Chapman*, 8 *C. & P.* 559: *Reg.* v. *Owen*, 9 *C. & P.* 83: *Reg.* v. *Bolan*, 2 *M. & Rob.* 192: *Reg.* v. *Macarthy*, *C. & Mar.* 625: *Reg.* v. *Savage*, 1 *C. & K.* 75. And it seems this may be done, on the defendant's application, after the jury have been charged with the indictment, and before any evidence has been given in the case. *Reg.* v. *Fitzgerald*, 1 *C. & K.* 201. Where the application is made by the defendant, he will be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor, it is in the discretion of the court either to detain the defendant in custody, or admit him to bail, or to discharge him on his own recognisances. *R.* v. *Beardmore*, 7 *C. & P.* 497: *R.* v. *Parish*, *Id.* 782: *R.* v. *Osborn*, *Id.* 799: *Reg.* v. *Bridgman*, *C. & Mar.* 271. After a bill has been found, if the offence be of a serious nature, the court will not admit the prisoner to bail. *Reg.* v. *Chapman*, 8 *C. & P.* 558: *Reg.* v. *Guttridge*, 9 *C. & P.* 228: *Reg.* v. *Owen*, *Id.* 83: *Reg.* v. *Bowen*, *Id.* 509. In *R.* v. *Palmer*, 6 *C. & P.* 652, the judges of the Central Criminal Court postponed until the next session the presentment of a bill for a capital offence to the grand jury, upon the ground of the illness of a witness sworn to be material, and refused to examine her deposition to ascertain whether she deposed to material facts.

Indictments for misdemeanors, where the defendant was not actually in custody, were not formerly tried at the assizes or sessions in which the defendant pleaded to or traversed the indictment; but the practice was to require the defendant to enter into recognisances to appear at the next assizes or sessions then to try the traverse, giving notice to the prosecutor according to the practice of the particular court in which the indictment might happen to be. 4 *Bl. Com.* 351. Now, however, in all misdemeanors, (except those for nonrepair of highways), by stat. 60 *G.* 3 & 1 *G.* 4, *c.* 4, *s.* 3, where the defendant has been committed to custody or held to bail twenty days before the assizes or sessions at which the indictment is found,

the defendant must plead to the indictment and proceed to trial at the same assizes or sessions, unless a writ of *certiorari* is delivered before the jury are sworn. The *certiorari* may be obtained before the indictment is found. But where the defendant has neither been in custody nor on bail, he cannot force the prosecutor on to trial at the same assizes or sessions. *Reg.* v. *Trenfield*, 9 *C. & P.* 284. Where the defendant is not in custody or on bail twenty days before the assizes or sessions at which the indictment is found, but has been committed to custody or held to bail to appear for such offence at some subsequent assizes or sessions, or shall receive notice (which does not mean a formal notice given by the prosecutor, but only *knowledge* of the fact, *Reg.* v. *Gregory*, 1 *C. & K.* 208) of such indictment having been found, twenty days before such subsequent assizes or sessions, he must then plead, and take his trial at such subsequent assizes or sessions, unless the proceeding be removed by *certiorari*. 60 *G.* 3 & 1 *G.* 4, *c.* 4, *s.* 5. The words of sect. 5 are, "for such offence;" and therefore, where the defendant was indicted for a felony and acquitted, and was subsequently indicted for a misdemeanor, it was holden that he was entitled to his traverse, though he had been committed for the felony more than twenty days, and the misdemeanor arose, in fact, out of the same transaction for which he had been committed for the felony. *R.* v. *Robinson*, 1 *M. & Rob.* 503: *R.* v. *James*, 3 *C. & P.* 222. So also, where he is indicted for a different misdemeanor from that for which he has been committed or held to bail more than twenty days, he is entitled to traverse. *Reg.* v. *Howell*, 9 *C. & P.* 437: *Reg.* v. *O'Neill*, 1 *C. & K.* 138. The court may, upon application, allow further time to plead, 60 *G.* 3 & 1 *G.* 4, *c.* 4, *s.* 7, and may also, as in the case of felonies, postpone the trial upon special grounds. *See R.* v. *Ashburn*, 8 *C. & P.* 50. A defendant arrested during the same assizes at which the bill has been found, cannot be discharged on bail without pleading and traversing. *Reg.* v. *Wettenhall*, 2 *M. & Rob.* 291.

Where the defendant intends to traverse an indictment, he must appear in court with two sufficient sureties; and, having pleaded to the indictment, must enter into a recognisance to appear, enter, and try his traverse at the next assizes or sessions, as the case may be; 4 *Bl. Com.* 351; and, if he intends to try his traverse at the next assizes or sessions, must serve the prosecutor with notice to that effect, according to the practice of the court. *See Reg.* v. *Minshall*, 8 *C. & P.* 576. The justices at sessions may regulate the notice to be thus given. It is said, 6 *Chit. Burn.* 101, that two days before or for the sessions, and eight days before or for the assizes is sufficient; but on the Oxford circuit ten days' notice is required, and the practice varies at different places. The notice so required is but a regulation of practice, and not a condition precedent; the want of it is therefore cured by the prosecutor's appearance. *R.* v. *Hobby*, 1 *C. & P.* 660; *Ry. & M. N. P.* 241. The prosecutor may, however, appear by counsel to object to the insufficiency of notice, without waiving the irregularity in the notice. *R.* v. *Featherstonhaugh*, 8 *C. & P.* 109. If the defendant shews by affidavit that he was unable to find the prosecutor, so as to serve him with the notice of trial, and the prosecutor does not appear, the defendant will be discharged by proclamation at the end of the assizes or sessions. *Reg.* v. *Hibburd*, 1 *C. & K.* 461. Before he enters his traverse, the defendant, if he is not in custody, must get from the clerk of the peace at the sessions, or clerk of the crown at the assizes, a record of the proceedings and a writ of

*venire facias*, which latter must be returned by the sheriff; and he must then enter his traverse and pay his fees. If he is bound by recognisance to appear and try, he cannot surrender into custody, and so avoid the payment of his fees. *R.* v. *Fry*, 1 *Leach*, 111: *Reg.* v. *Bishop*, *C. & Mar.* 302.

As to the course of proceeding when *cross* traverses are entered, *see Reg.* v. *Wanklyn*, 8 *C. & P.* 230.

*Where.*]—Indictments for felonies and misdemeanors are tried within the jurisdiction in which the offence is committed, or in which by statute the venue may be laid, (*see ante*, p. 18 *et seq.*), and before the court in which the indictment is preferred. This is the general rule; but there are particular cases in which it does not prevail, and which it may be useful here to mention.

For instance, indictments found at the sessions and transmitted by the justices to the assizes, must be tried at the assizes, although they be not moved by *certiorari; R.* v. *Wetherell*, *R. & R.* 381; and the Court of Queen's Bench has jurisdiction to change the place of trial in felonies and misdemeanors, whenever it is necessary for the purpose of securing, as far as possible, a fair and impartial trial. *Per Lord Denman*, C. J., 5 *B. & Ad.* 354.

For this purpose a *certiorari* must issue to remove the indictment into the Court of Queen's Bench, upon which, at common law, after the general issue pleaded, there would be a trial at bar by a jury of the county in which the indictment was preferred. But a writ of Nisi Prius usually issues, by the attorney-general's consent, 2 *Inst.* 424, to the proper county in which the indictment was found, unless the *venire* be awarded to a foreign county upon suggestion by order of the court.

The writ of *certiorari* is demandable as of right by the crown, *R.* v. *Eaton*, 2 *T. R.* 89, and issues as of course where the attorney-general or other officer of the crown applies for it, either as prosecutor or as conducting the defence on behalf of the crown; *Ib.*; *R.* v. *Lewis*, 4. *Burr.* 2458; and this, even though the *certiorari* be expressly taken away by statute; for, unless named, the crown is not bound by statute. By analogy to this rule, the *certiorari* was formerly granted almost of course to private prosecutors, who were said to represent the crown, at whose suit all indictments are instituted. But now, by stat. 5 & 6 *W.* 4, *c.* 33, no writ of *certiorari* can issue from the Court of Queen's Bench at the instance of any prosecutor or other person (except the attorney-general) without motion first made in court, or to a judge at chambers, and leave obtained, in the same manner as if the application were made by the defendant.

It is now, therefore, in the discretion of the court to grant or refuse the *certiorari* at the prayer of either party; 2 *Hawk. c.* 27, *s.* 27; and in the exercise of this discretion, the writ is seldom granted at the prayer of the defendant where the offence is serious, as in perjury, forgery, or any serious misdemeanor, *Id. s.* 28; *R.* v. *Pusey*, 2 *Str.* 717, murder, *R.* v. *Mead*, 3 *D. & R.* 301: *R.* v. *Thomas*, 4 *M. & Sel.* 442, unnatural crimes, *R.* v. *Holden*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167, and the like. *See R.* v. *Penpraze*, 4 *B. & Ad.* 575; 1 *Nev. & M.* 312. So the court will not in general, except by the consent of the prosecutor, remove an indictment from a court of competent jurisdiction where any of the judges preside; *see R.* v. *Wartnaby*, 2 *Ad. & Ell.* 435: *R.* v. *Duchess of Kingston*, *Cowp.* 283; and the mere necessity

for a special jury is not alone a sufficient ground for granting the writ. *R.* v. *Green*, 1 *Wil.*, *Wol.*, *& Hod.* 35. The court will, however, remove an indictment where it is clear that difficult points of law may arise. *R.* v. *Wartnaby*, 2 *Ad. & Ell.* 435: *R.* v. *Green*, 1 *Wil.*, *Wol.*, *& Hod.* 35. And if it be clearly made out that there is a fair and reasonable probability of partiality and prejudice in the jurisdiction within which the indictment would otherwise be tried, the *certiorari* will be granted. *R.* v. *Lewis*, 2 *Str.* 704: *R.* v. *Fowle*, 2 *Ld. Raym.* 1452: *R.* v. *Waddington*, 1 *East*, 167: *R.* v. *Penpraze*, 4 *Ad. & Ell.* 575; 1 *Nev. & M.* 312: *R.* v. *Hunt*, 3 *B. & Ald.* 444: *R.* v. *Holden*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167: *R.* v. *Lever*, 1 *Wil.*, *Wol.*, *& Hod.* 35. So, if the prosecutor or his attorney be sheriff or under-sheriff, *R.* v. *Webb*, 2 *Str.* 1068: *R.* v. *Knatchbull*, 1 *Salk.* 150, the writ will be granted. It is said, also, that if the prosecution originate in malice, *Bac. Abr.*, *Certiorari*, (*A*), or if there has been vexatious delay, *R.* v. *Morgan*, 2 *Str.* 1049: *R.* v. *Ferguson*, *Rep. Temp. Hard.* 370, or unnecessary expense, the court will grant a *certiorari*. *Com. Dig.*, *Certiorari*, (*D*).

By stat. 60 *G.* 3 & 1 *G.* 4, *c.* 4, *s.* 4, the *certiorari* may be applied for before the indictment is found, for a misdemeanor; and so likewise in felony; for it removes any record that shall come within its description before its return. 2 *Hawk. c.* 27, *s.* 23. Where there are several defendants, all should concur, either on their own behalf or on behalf of the applicant. *R.* v. *Hunt*, 2 *Chit. Rep.* 130.

If the defendant remove an indictment by *certiorari*, he will, if convicted, be liable to costs to the prosecutor or party grieved, 5 & 6 *W & M. c.* 11, *s.* 3, on the counts on which he is convicted. *Reg.* v. *Hawdon*, 11 *Ad. & Ell.* 143; 3 *P & D.* 44. *See, as to this subject*, 1 *Burn's Justice, by Chitty*, 624.

It may be useful to observe, that where the quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county, after the grand jury have been discharged, it has been considered proper that, the quarter sessions should not proceed with the trial of prisoners, but, after disposing of their other business, should adjourn to a future day. *See* 9 *C. & P.* 790.

By the stat. 5 & 6 *Vict. c.* 38, it is enacted, that after the passing of that act, (June 30, 1842), neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall at any session of the peace, or at any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life, or for any of the following offences:—1. Misprision of treason; 2. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament; 3. Offences subject to the penalties of *præmunire*; 4. Blasphemy, and offences against religion; 5. Administering and taking unlawful oaths; 6. Perjury and subornation of perjury; 7. Making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor; 8. Forgery; 9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern; 10. Bigamy, and offences against the laws relating to marriage; 11. Abduction of women and girls; 12. Endeavouring to conceal the birth of a child; 13. Offences against any provision of the laws relating to bankrupts and insolvents; 14. Com-

posing, printing, or publishing blasphemous, seditious, or defamatory libels; 15. Bribery; 16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person; 17. Stealing, or fraudulently taking, or injuring or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein; 18. Stealing, or fraudently destroying or concealing, wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments.

## CHAPTER II.

### INFORMATION.



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### SECT. 1.

#### INFORMATION EX OFFICIO.

*What, and in what cases.*]—THE information *ex officio* is a formal written suggestion of an offence committed, filed by the Queen's attorney-general (or, in the vacancy of that office, by the solicitor-general, *R.* v. *Wilkes*, 4 *Burr.* 2527; 4 *Bro. P. C.* 360) in the court of Queen's Bench, without the intervention of a grand jury.

It lies for misdemeanors only, and not for treasons, felonies, *Com. Dig.*, *Information*, (A. 1); *R.* v. *Prynn*, 1 *Show.* 107: *R.* v. *Berchett*, 5 *Mod.* 459, or misprision of treason; 2 *Hawk. c.* 26, *s.* 3; for wherever any capital offence is charged, or an offence so highly penal as misprision of treason, the law of England requires that the accusation should be warranted by the oath of twelve men, before the defendant be put to answer it. The usual objects of an information *ex officio* are properly such enormous misdemeanors as peculiarly tend to disturb or endanger the Queen's government, or to molest or affront her in the regular discharge of her royal functions; 4 *Bl. Com.* 308; such, for instance, as seditious or blasphemous libels or words; seditious riots not amounting to high treason; libels upon the Queen's ministers, the judges, or other high officers, reflecting upon their conduct in the execution of their official duties; obstructing such officers in the execution of their duties; obstructing the Queen's officers in the collection, &c., of the revenue; against officers themselves for bribery, or for other corrupt or oppressive conduct; and the like.

*Form of it.*]—The form of an information *ex officio* is thus:—

"*Trinity Term*, 8 *Vict.*

"MIDDLESEX:—*Be it remembered that Sir Frederick Thesiger, Knight, attorney-general of our Sovereign lady the Queen, who for our said lady the Queen prosecutes in this behalf, in his proper person comes into the court of our said lady the Queen before the Queen herself at Westminster in the county of Middlesex, on* [Wednesday next after three weeks of the Holy Trinity in this same term], *and for our said lady the Queen gives the court here to understand and be informed, that,*" &c., so proceeding to state the facts and circumstances constituting the offence, with the same certainty and precision as in an indictment, and in the same form, and according to the same rules, excepting that, in introducing averments, instead of the words "*And the jurors aforesaid, upon their oath aforesaid, do further present,*" are used the words, "*And the said attorney-general of our said lady the Queen, for our said*

*lady the Queen, further gives the court here to understand and be informed, that,"* &c. The conclusion is the same as in an indictment.

The second and subsequent counts commence thus: "*And the said attorney-general of our said lady the Queen, for our said lady the Queen, further gives the court here to understand and be informed, that,*" so proceeding to state the offence, and concluding as in an indictment. And to the conclusion of the last count are added these words: "*And therefore the said attorney-general of our said lady the Queen prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said J. S. in this behalf, to make him answer to our said lady the Queen touching and concerning the premises aforesaid.*"

This information is filed in the crown office, without any leave previously obtained of the court for that purpose; and the court therefore will not entertain a motion by the attorney-general for a criminal information at the suit of the crown, as in the ordinary cases of an information by the master of the crown office at the suit of an individual; *R.* v. *Phillips*, 3 *Burr.* 1564: *R.* v. *Plymouth*, 4 *Burr.* 2089; 1 *Deacon*, (*n.*) 672; nor will the court, upon the application of the defendant, restrain the attorney-general from filing an *ex officio* information, upon the ground that a criminal information has already been granted for the same cause. *R.* v. *Alexander*, *MS.*, *E. T.* 1830.

The court will not quash an information *ex officio* at the instance of the prosecutor, because the attorney-general may, if he will, enter a *nolle prosequi*; *R.* v. *Stratton*, 1 *Doug.* 239, 240; and even upon the motion of the defendant, they will seldom quash it, but generally put the defendant to demur, &c.; *see Com. Dig.*, *Information*, (*D.* 4): *R.* v. *Gregory*, 1 *Salk.* 372; and after demurrer the information may be amended. *R.* v. *Holland*, 4 *T. R.* 457.

The information having been filed, the defendant, after appearance, upon application to the court, is entitled to a copy of it free of expense. 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 8. If the attorney-general delay bringing the information to trial, the defendant cannot take it down by proviso; *R.* v. *M'Leod*, 2 *East*, 202; but if it be not brought to trial within twelve calendar months next after the plea of not guilty has been pleaded, the defendant may, after twenty days' notice to the attorney or solicitor-general, apply to the court in which the prosecution is depending, and the court may authorize the defendant to bring on the trial, who may bring it on accordingly, unless a *nolle prosequi* be entered. 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 9. The attorney-general is entitled, if he please, to a trial at bar; *R.* v. *Johnson*, 1 *Str.* 544; and on the trial has the right of reply, even though the defendant call no witnesses. *R.* v. *Marsden*, *M.* *&* *M.* 439. The same right exists also in prosecutions by a government office, in which the counsel for the prosecutor states that he appears as the representative of the attorney-general. *Reg.* v. *Gardner*, 1 *C.* *&* *K.* 628.

If the defendant is acquitted, or a *nolle prosequi* be entered, he has all his own expenses to defray, as it is beneath the dignity of the crown to receive costs or to pay them. *Hullock*, 557.

## Sect. 2.

### INFORMATIONS BY THE MASTER OF THE CROWN OFFICE.

*What, and in what cases.*]—An information by the Master of the Crown Office is a formal written suggestion of an offence committed, filed in the Court of Queen's Bench, at the instance of an individual, with the leave of the court, by the Master of the Crown Office, without the intervention of a grand jury.

This, like the information *ex officio*, (*see antè, p.* 71), lies for misdemeanors only, 2 *Hale*, 151, and not for treasons, felonies, or misprision of treason. Although the court have it in their discretion to give leave to file a criminal information of this description for any misdemeanor whatever, yet they usually confine it to gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government; (for those are left to the care of the Attorney-General; *but see R.* v. *Harvey*, 3 *D. & R.* 464; 2 *B. & C.* 257); but which, on account of their magnitude or pernicious example, deserve the most public animadversion. Thus, for instance, they have granted a criminal information for an attempt to bribe a privy councillor to obtain a patent of an office under government; *R.* v. *Vaughan*, 4 *Burr.* 2494; for an attempt to bribe at an election for members to serve in Parliament; *R.* v. *Robinson*, 1 *W. Bl.* 541: *R.* v. *Isherwood*, 2 *Ld. Ken.* 202: *R.* v. *Pitt*, 1 *W. Bl.* 380; 3 *Burr.* 1335; for bribing persons, either by money or promises, to vote at elections of officers of corporations; *R.* v. *Plympton*, 2 *Ld. Raym.* 1377; for bribery in the election of an alderman, who, by virtue of his office, is a justice of the peace; *R.* v. *Stewart*, 2 *B. & Ad.* 12; for attempting to bribe jurymen, *R.* v. *Young*, 2 *East*, 14, clerks in public offices, *R.* v. *Beale*, 1 *East*, 103, and the like. They have granted a criminal information for endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. *R.* v. *Joliffe*, 1 *East*, 154, *n.* Where a music master, in consideration of a sum of money, assigned over his female apprentice to a gentleman, under pretence of her receiving lessons from him in music, but really for the purposes of prostitution, the court upon application granted a criminal information against the gentleman, the music master, and the attorney who drew the assignment. *R.* v. *Delaval*, 3 *Burr.* 1434; 1 *W. Bl.* 410, 439. They will grant a criminal information also for libels reflecting on the conduct of private individuals, if attended with circumstances of aggravation; *see R.* v. *Benfield*, 2 *Burr.* 980: *R.* v. *Miles*, 1 *Dougl.* 283: *R.* v. *Haswell*, *Id.* 387: *R.* v. *Staples*, *Andr.* 288; and for libels reflecting on the conduct of magistrates in the execution of their duties, *see R.* v. *Waite*, 1 *Wils.* 22, of members of Parliament in the execution of their duties in Parliament, *see R.* v. *Haswell*, 1 *Doug.* 387, of persons high in office under government in the execution of their several duties of a public body, *R.* v. *Williams*, 5 *B. & Ald.* 595, and the like. *See* 7 *Mod.* 400; *Lofft*, 148; 1 *W. Bl.* 294. Where an order was made by a corporation, and entered on their books, stating that J. S. (against whom a jury had given a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in the Court of Common Pleas) was actuated by motives of public justice, &c., in preferring the indictment, the

court, deeming the order to be a libel reflecting upon the administration of justice, upon application granted a criminal information against the parties concerned in making it. *R* v. *Watson*, 2 *T. R.* 199. So, where a defendant in an information, immediately before the trial, distributed handbills in the assize town vindicating his own conduct and reflecting on that of the prosecutor, the court, considering the handbills to have been distributed by the defendant for the purpose of influencing the jury in his favour at the trial, granted a criminal information against him. *R.* v. *Joliffe*, 4 *T. R.* 285. So, the court granted a criminal information against a person for publishing the proceedings before a coroner, with comments, previously to the trial, although the statement was correct and no malicious motive shewn; for such publications have a tendency improperly to influence the public mind, and particulary the jury by whom the cause is afterwards to be tried. *R.* v. *Fleet*, 1 *B. & Ald.* 379. *See R.* v. *Wright*, 8 *T. R.* 293. So, an information has been granted for publishing an invective against judges and juries, with a view to bring into suspicion and contempt the administration of justice; *R* v. *White*, 1 *Camp.* 359; and it is an offence for which an information will be granted to publish a blasphemous libel, *R.* v. *Carlile*, 3 *B. & Ad.* 164, or an invective upon the established religion of the country. *R.* v. *Waddington*, 1 *B. & C.* 26: *R.* v. *Curl*, 2 *Str.* 789. But an information has been refused for calling a magistrate a liar, and charging him with a particular misconduct in his office, there being no intent to provoke a breach of the peace. *Ex parte Chapman*, 4 *Ad. & Ell.* 773.

The court will grant a criminal information against a magistrate for any illegal act committed by him from corrupt or vindictive motives; *R.* v. *Brooke*, 2 *T. R.* 190: *R.* v. *Holland*, 1 *T. R.* 692: *R.* v. *Harris*, 3 *Burr.* 1716: *R.* v. *Williams*, *Id.* 1317: *R.* v. *Cozens*, 1 *Dougl.* 426. *See Andr.* 238, 272; 1 *Str.* 21, 413; 1 *Chitty*, 217; 2 *Ld. Ken.* 517; *Lofft*, 62; 1 *Wils.* 7; 1 *D. & R.* 485; 4 *Mann. & R.* 431; but not where he appears to have acted from ignorance or mistake merely; *R.* v. *Jackson*, 1 *T. R.* 653: *R.* v. *Barker*, 1 *East*, 186: *R.* v. *Bayles*, 5 *Burr.* 1318: *R.* v. *Fielding*, 2 *Id.* 719: *R.* v. *Barrow*, 3 *B. & Ald.* 432: *Ex parte Fentiman*, 2 *Ad. & Ell.* 127; nor will they grant it against justices acting in sessions, except in very flagrant cases. *R.* v. *Seaford*, 1 *W. Bl.* 432.

So, against ministerial officers, for any act of oppression, or for any illegal act committed by them in the execution of their duties, from corrupt, vindictive, or other improper motives, the court will grant a criminal information; but not where they act from ignorance or mistake merely. *R.* v. *Friar*, 1 *Chitty's Rep.* 702. Thus, informations have been granted against overseers for forcing a pauper to marry another pauper then pregnant with a bastard; *R.* v. *Tarrant*, 4 *Burr.* 2136; for a conspiracy by parish officers to marry persons settled in different parishes, *R.* v. *Crompton*, *Cald.* 246: *R.* v. *Herbert*, 2 *Ld. Ken.* 466, and for procuring one to marry an idiot chargeable to the parish; *R.* v. *Winter*, 1 *Wils.* 41; but the court have now resolved to refuse informations in cases like these, and to leave the applicant to seek his remedy by indictment. *Cald.* 247, *n.* (*a*); 2 *Nolan*, 262.

The court have granted a criminal information against a person for refusing to take upon himself the office of sheriff, because the vacancy of the office occasioned an interruption of public justice, and the year would be nearly expired before an indictment could be brought to

trial. *R.* v. *Woodrow*, 2 *T. R.* 731. *See R.* v. *Grosvenor*, 2 *Str.* 1193; 1 *Wils.* 18.

The court, however, will not in general grant a criminal information for an illegal act committed by a person under a *bonâ fide* conviction that he was merely exercising a legal right; *R.* v. *Parkyns*, 3 *B.* & *Ald.* 668; or where the application is made against a poor man residing at a distance, to whom it would be very inconvenient, if not impossible, to shew cause against the rule, or to appear afterwards to receive judgment if convicted. *See R.* v. *Crompton*, *Cald.* 246; *Lofft*, 155. They have refused it also against the members of a corporation, for a misapplication of the corporation funds, it being rather a subject for an application to the Court of Chancery. *R.* v. *Watson*, 2 *T. R.* 199. They have refused it for the misapplication of money collected on a brief, *R.* v. *St. Botolph*, 1 *W. Bl.* 433, and for not collecting money on a brief. *R.* v. *Ford*, 2 *Str.* 1130. They have also refused to grant it, where it appeared that the party applying had suppressed some of the material facts of the case, and misrepresented others; *R.* v. *Wroughton*, 3 *Burr.* 1683; and also where the applicant was not himself free from imputation. *Lofft*, 314. So, where an application for a criminal information was made for raising great sums by subscription, for trading purposes, as being one of those schemes denounced by stat. 6 *G.* 1, *c.* 18, *s.* 18, the court refused to grant it, as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to an application to the court. *R.* v. *Dodd*, 9 *East*, 516. *See R.* v. *Webb*, 14 *East*, 406. So, the court refused an information for sending a challenge, when it appeared that the party applying had previously written letters to the other, provoking him to fight; but the court said, that, if both parties had applied for informations, they would have granted them. *R.* v. *Hankey*, 1 *Burr.* 316. So, an information has been refused, where the application was made by notorious gamesters against other gamesters, for a conspiracy to cheat them at a race. *R.* v. *Peach*, 1 *Burr.* 548. Even in cases which would warrant an information, if the court think that it will be sufficient punishment for the defendant to pay the costs already incurred by the prosecutor, they will discharge the rule *nisi* upon those terms, if acceded to by the defendant. *R.* v. *Morgan*, 1 *Doug.* 314: *R.* v. *Cozens*, 2 *Doug.* 426.

*When and how to be moved for, &c.*]—The application is for a rule to shew cause why a criminal information should not be filed against the party complained of, and must be founded upon an affidavit disclosing all the material facts of the case. If the court grant the rule *nisi*, it is afterwards, upon shewing cause, discharged or made absolute, as in ordinary cases. It may be necessary to mention that the motion must be made by a barrister or serjeant; the court will not entertain the application if made by a private individual. 1 *Chit. Rep.* 602.

It is an established rule that no application for a criminal information can be made against a magistrate for anything done in execution of his office, without previous notice. *R.* v. *Heming*, 5 *Ad.* & *Ell.* 666. The application must be made within a reasonable time, or the delay must be satisfactorily accounted for. The only exception to this is the case of bribery at parliamentary elections, a criminal information for which cannot be moved for until after the two years have

elapsed within which an action may be brought for the penalties. *See R.* v. *Robinson*, 1 *W. Bl.* 541. If the application be made against a magistrate for any thing done by him in the execution of his office, if the offence were committed in vacation, the motion must be made in the next term, if it be an issuable term, or in the second term, if the first be not an issuable term; *see R.* v. *Harries*, 13 *East*, 270: *R.* v. *Bishop*, 5 *B. & Ald.* 612; but if the offence were committed in term time, the application may be made either in that term, or, it should seem, in the next, particularly if there be not a sufficient number of days remaining of the first term to allow a reasonable time for the prosecutor to obtain his rule *nisi*, and for the defendant to shew cause against it. The application against a magistrate, if made in the same term in which the offence was committed, is allowed to be made at the latter end of the term; *R.* v. *Smith*, 7 *T. R.* 80; if made in another term, or if the offence were committed in vacation, it must be made so early in the term as to afford sufficient time for him to shew cause against it during the same term. *R.* v. *Marshall*, 13 *East*, 322; 7 *T. R.* 80. Before the court entertain an application for a criminal information against a magistrate, for convicting without having summoned the party, the conviction must be removed. *R.* v. *Heber*, 2 *Str.* 915. They have refused an information against a clergyman for perjury upon his admission to his living, until after he was convicted of the simony. *R.* v. *Lewis*, 1 *Str.* 70. Nor will they grant an information for an attempt to suborn witnesses in a civil suit while the action is pending, except in very clear cases. *R.* v. *Phillips*, *Hardw.* 241.

The affidavit upon which the application is made must disclose all the material facts of the case; if a material fact be suppressed or misrepresented, the court, we have seen, will discharge the rule, very probably with costs. Also, as the court in these cases are in a manner substituted for a grand jury, they will in general expect that the facts so disclosed shall amount to such evidence as would satisfy a grand jury, if an indictment were preferred for the offence. *R.* v. *Willett*, 6 *T. R.* 294: *R.* v. *Williamson*, 3 *B. & Ald.* 583. An information will be granted upon the uncontradicted affidavit of one who was *particeps criminis*. *R.* v. *Steward*, 2 *B. & Ad.* 12. If the subject of the application be a libel upon an individual, charging him with a particular offence, the court always require the prosecutor to deny the charge upon oath, before they will grant the information; *R.* v. *Miles*, 1 *Doug.* 283, 284, 387; but if the charge be general, or be against a public body of men; *R.* v. *Williams*, 5 *B. & Ald.* 595; 1 *D. & R.* 197; or if it relate to anything said, or supposed to have been said, by the prosecutor in Parliament as a member, *R.* v. *Miles*, 1 *Doug.* 387, it is otherwise. Where a criminal information was applied for against a magistrate, for improperly convicting a person, the court refused to grant it, unless the party complaining would make an exculpatory affidavit denying the charge. *R.* v. *Webster*, 3 *T. R.* 388. The affidavit upon which the rule *nisi* is moved for must not be intitled in any cause; *R.* v. *Harrison*, 6 *T. R.* 60: *R.* v. *Robinson Id.* 642; the affidavits, upon shewing cause, are intituled *The King* v. the party complained of. *R.* v. *Innes*, 1 *Str.* 704. *See R.* v. *Cole*, 6 *T. R.* 642. It may be necessary also to mention, that, if it be intended to file a joint information against several persons, the application should be joint against all in the first instance; for, where distinct rules were obtained against five persons severally, and one information thereupon filed against them jointly,

the court, upon application, set aside the proceedings. *R.* v. *Hayden*, 3 *Burr.* 1270.

A rule for a criminal information was granted, and discharged upon an affidavit of the truth of the charge: subsequently it was discovered that the affidavit in answer to the rule was false, and the court granted another rule, which was made absolute. *R.* v. *Eve*, 5 *Ad. & Ell.* 780.

*Form of it.*]—The form of an information filed by the Master of the Crown Office is thus:—

"*Trinity Term*, 8 *Vict.*

"MIDDLESEX:—*Be it remembered, that Christopher Robinson, Esq., coroner and attorney of our lady the now Queen, in the court of our lady the Queen, before the Queen herself, who prosecutes for our said lady the Queen in this behalf, in his proper person, comes here into the court of our said lady the Queen, before the Queen herself, at Westminster on* [Monday next after eight days of the Holy Trinity, in this same term], *and for our said lady the Queen gives the court here to understand and be informed that*" &c., so proceeding to state the facts and circumstances constituting the offence with the same certainty and precision as in an indictment, and in the same form, and according to the same rules, *R.* v. *Wilkes*, 4 *Burr.* 2556: *R.* v. *Knight*, 1 *Salk.* 375, excepting that, in introducing averments, instead of the words, "*And the jurors aforesaid, upon their oath aforesaid, do further present,*" are used the words, "*And the said coroner and attorney of our said lady the Queen, who prosecutes as aforesaid, further gives the court here to understand and be informed that*" &c. The conclusion is the same as in an indictment.

The second and subsequent counts commence thus:—"*And the said coroner and attorney of our said lady the Queen, who prosecutes as aforesaid, further gives the court here to understand and be informed, that*" &c., so proceeding to state the offence, and concluding as in an indictment. And to the conclusion of the last count are added these words:—"*And therefore the said coroner and attorney of our said lady the Queen prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said J. S. in this behalf, to make him answer to our said lady the Queen, touching and concerning the premises aforesaid.*"

*How filed, &c.*]—After the court have made the rule absolute, the information may be filed at the Crown Office, King's Bench Walk, Temple, upon the prosecutor's entering into the usual recognisances for costs. Formerly, the Master of the Crown Office had the power of filing informations without any control; and, being filed in the name of the king, they subjected the prosecutor to no costs, however groundless they turned out to be at the trial. But some abuses of this power, previously to the Revolution, caused it shortly afterwards to be enacted, by stat. 4 & 5 *W. & M. c.* 18, that the Master of the Crown Office should not thereafter file any information without express direction from the Court of King's Bench; and that every prosecutor, permitted to promote such information, should give security by a recognisance of 20*l.* conditioned to prosecute the same with effect, and to pay costs to the defendant in case he be acquitted thereon, unless the judge who tries the information certify that there was reasonable cause for filing it; and, at all events, to pay costs, unless the information shall be tried within a year after issue joined. The defendant, however, upon his ac-

quittal, is not entitled to any costs beyond the extent of this recognisance. *R.* v. *Filewood,* 2 *T. R.* 145. *See R.* v. *Brooke,* 2 *T. R.* 190.

When the information is filed, process issues to compel the appearance of the defendant, if an appearance be not already entered for him. He then either pleads to it, or applies to quash it; and, on issue joined, the proceedings are brought on to trial. 3 *Chitt. Burn.* 368.

*In what cases quashed.*]—The court will very seldom quash an information filed by the Master of the Crown Office; indeed in some of the books it is laid down that they will not quash it in any case. *See R.* v. *Nixon,* 1 *Str.* 185: *R.* v. *Fountain,* 1 *Sid.* 152. They have, however, interfered in this manner, in a very few cases, under particular circumstances. *See R.* v. *Roper,* 2 *Str.* 1072: *R.* v. *Williams,* 1 *Burr.* 385. If quashed on the motion of the prosecutor, it must be upon payment of costs, at least to the extent of the recognisance. Where a criminal information had been granted, and the Attorney-General afterwards, for the same cause, filed an information *ex officio,* the court stayed the former until further order. *R.* v. *Alexander, MS., E. T.* 1830.

## CHAPTER III.

### PLEAS, REPLICATIONS, &c.





### SECT. 1.

#### ORDER AND TIME OF PLEADING.

THE stat. 4 *Anne*, *c.* 16, *ss.* 4, 5, which in civil cases allows a defendant by leave of the court to plead several matters, contains a proviso that nothing therein shall extend to any indictment or presentment of treason, felony, or murder, or any other matter, or to any action upon a penal statute. Criminal proceedings, therefore, remain under the same restriction which existed as to all matters at common law, and no more than one plea can be pleaded to any indictment or criminal information. In felonies, however, if the defendant plead in abatement, or specially in bar, he may at the same time, or afterwards, if the plea be adjudged against him, plead over to the felony.

When brought to the bar and arraigned, the prisoner either confesses the charge, stands mute of malice, or does not answer directly to the charge, which may be entered as a plea of not guilty; 7 *&* 8 *G.* 4, *c.* 28, *s.* 2; or pleads to the jurisdiction, or in abatement—or demurs—or pleads specially in bar—or generally, that he is not guilty. In addition to these several modes of pleading, there were formerly what were called declinatory pleas—the plea of sanctuary, and the plea of clergy. The privilege of sanctuary was abolished by stat. 21 *J.* 1, *c.* 28, and the plea of clergy was, before the recent statute, disused, because it was more advantageous for the prisoner to pray clergy after, than to plead it before, his conviction. To the prayer of clergy, in certain cases, the Crown might counterplead. But, now, the benefit of clergy, and also the like privilege of peerage, given by the stat. 1 *Edw.* 6, *c.* 12, *s.* 13, are abolished, 7 *G.* 4, *c.* 28, *s.* 6; 4 *&* 5 *Vict.* c. 22, and the plea and prayer, and counterplea of clergy, are therefore no longer in use.

When the defendant has any special matter to plead in abatement or in bar, or if the indictment be demurrable, he should plead it, or

demur at the time of arraignment, before the plea of not guilty. *See R.* v. *Bankes,* 2 *Smith,* 620. Where a defendant prosecuted in the Court of Queen's Bench for any misdemeanor, by information or indictment there found or removed into that court, appears in court in term time in person to answer the indictment or information, he cannot imparl to a following term, but must plead or demur thereto within four days from the time of its appearance; and, in default of his pleading or demurring within four days, judgment may be entered against him for want of a plea: if he appear to the indictment by attorney, he cannot imparl to the following term, but may forthwith be ruled to plead; and a plea or demurrer may be enforced, or judgment by default entered thereupon, in the same manner as before the passing of the act might have been done, had the defendant appeared by his attorney in the preceding term. 60 *G.* 3 *&* 1 *G.* 4, *c* 4, *s.* 1. But the court or a judge may, on sufficient cause, allow further time to plead or demur. 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 2.

At common law, a defendant indicted for a misdemeanor might, after plea, traverse the indictment to the next session or assizes. But now, in all cases, (except for the non-repair of bridges or highways, 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 10), if the defendant have been in custody or on bail twenty days, at the least, upon the *same* charge, he must, upon the finding of the indictment, plead and try *instanter;* 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 3; and if the indictment be found at a former session or assizes, and the defendant be in custody or on bail for the same offence, or receive notice of the indictment twenty days before any subsequent session or assizes, he must, at such subsequent session or assizes, plead and try. 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 5. But the court may allow the defendant farther time to plead. 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 7. Where the defendant was committed for a rape more than twenty days before the assizes, and afterwards, at the assizes, the grand jury threw out the bill for the rape, but found a bill for an assault with intent to commit it, *Vaughan,* B., held that the defendant was entitled to traverse this latter indictment. *R.* v. *James,* 3 *C.* *&* *P.* 222. (*See ante, p.* 67).

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## SECT. 2.

### PLEA TO THE JURISDICTION.

WHERE an indictment is taken before a court that hath no cognisance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged; 2 *Hale,* 286; as if a man be indicted for treason at the quarter sessions, or for a rape at the sheriff's tourn, or the like; *Ib.*; or if another court have exclusive jurisdiction of the offence. 4 *Bl. Com.* 383.

But, although the defendant may plead to the jurisdiction in such a case, there are but few instances in which he is obliged to have recourse to such a plea. If the offence were committed out of the jurisdiction of the court, the defendant may take advantage of this matter under the general issue; *R.* v. *Johnson,* 6 *East,* 583; or, if the objection appear upon the face of the record, he may demur, or (it should seem) move in arrest of judgment, or bring a writ of error. *See R.* v. *Hewitt, R.* *&* *R.* 58. If, on the other hand, the offence were committed within the jurisdiction of the court, but the

court has not cognisance of it, (which can occur only in the case of indictments in inferior courts, such as the court of quarter sessions), the defendant may have advantage of it upon general demurrer; *R.* v. *Fearnley*, 1 *T. R.* 316; or the Court of Queen's Bench, upon the indictment being removed by *certiorari*, will quash it; *R.* v. *Bainton*, 2 *Str.* 1088; or the court where the indictment is preferred will in general give the defendant advantage of the objection at the trial, under the general issue. As pleas to the jurisdiction, therefore, seldom occur, it is not necessary to treat of them here at length. The form of them is thus:—

"*And the said J. S., in his own proper person, cometh into court here, and, having heard the said indictment read, saith, that the court of our lady the Queen here ought not to take cognisance of the* [trespass and assault] *in the said indictment above specified; because, protesting that he is not guilty of the same, nevertheless the said J. S. saith, that,*" [&c., so proceeding to state the matter of the plea. See the precedents, 1 *Went.* 10, 18; 4 *Went.* 63. Conclude thus]: "*And this he the said J. S. is ready to verify; wherefore he prays judgment if the said court of our lady the Queen now here will or ought to take cognisance of the indictment aforesaid; and that by the court here he may be dismissed and discharged,*" &c. Then add profert of any letters patent which may have been set forth in the plea. The form is the same in the Queen's Bench, excepting that the court is described as "*the court of our said lady the Queen before the Queen herself here;*" and, in the case of informations, the words, "*having heard the said indictment read,*" are omitted. The plea must be verified by affidavit.

The form of the replication to this plea is thus:—"*And hereupon J. N.* [the clerk of the peace, or clerk of arraigns], *who prosecutes for our said lady the Queen in his behalf, says, that notwithstanding anything by the said J. S. above in pleading alleged, this court ought not to be precluded from taking cognisance of the indictment aforesaid; because he says, that,*" [&c., stating the matter of the replication]. "*And this he the said J. N. prays may be inquired of by the country,*" &c. Or, if it conclude with a verification, then thus:—"*And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may answer to the said indictment.*" Where the plea is pleaded in the Court of Queen's Bench, the replication is in the name of the Master of the Crown Office, in the case of an indictment or of an information filed by him; or in the name of the Attorney-General, in the case of informations *ex officio*. (*See post, Sect.* 5 *of this chapter*).

## Sect. 3.

### PLEA IN ABATEMENT.

If the indictment assign to the defendant no Christian name, or a wrong one, no surname, or a wrong one, or no addition, or a wrong one, he can only object to this matter by plea in abatement, (*ante*, *p.* 30); for, although formerly, if no addition were given, the court would, perhaps, have quashed the indictment, *R.* v. *Thomas*, 3 *D. & R.* 621, an application for that purpose would not now, since the recent statute, 7 *G.* 4, *c.* 64, *s.* 19, be entertained. Misnomer was the only case in which, before the recent statute, a plea of abatement was at all usual in practice, and the modern enactment, although it has not abrogated the rule of law which requires that the defendant

should be described by his Christian and surname, and has not repealed the Statute of Additions, 1 *H. 5, c.* 5, has entirely superseded every advantage formerly derived from that form of plea. The following is the form of a plea of misnomer :—

"*And James Long, who is indicted by the name of George Long, in his own proper person cometh into court here, and, having heard the said indictment read, saith, that he was baptized by the name of James, to wit, at the parish aforesaid, in the county aforesaid, and by the Christian name of James hath always since his baptism hitherto been called or known; without this, that he the said James Long now is or at any time hitherto hath been called or known by the Christian name of George, as by the said indictment is supposed; and this he the said James Long is ready to verify: wherefore he prayeth judgment of the said indictment, and that the same may be quashed,*" &c. *See R.* v. *Shakespeare*, 10 *East*, 87. This plea should be ingrossed on parchment or paper, although it is said to have been decided that it may be pleaded *ore tenus. R.* v. *Dean*, 2 *Leach*, 535. Annexed to it must be an affidavit, *R.* v. *Grainger*, 3 *Burr.* 1617, intitled, in the court and cause, to this effect :—"*James Long, of* ——, *the defendant in this prosecution, maketh oath and saith that the plea hereunto annexed is true in substance and matter of fact.*" It may be necessary to mention, that, although usual, it is not essential that the plea should state that the defendant was *baptized* by such a name ; saying that it is his name, and that by that name he was always called and known, is sufficient. *Walden* v. *Holman*, 6 *Mod.* 116 ; 1 *Salk.* 6 : *Read* v. *Mattcur, Hardw.* 286 ; *Com. Dig., Abatement* (F. 17). The court will not upon motion quash a bad plea in abatement. *R.* v. *Cooke*, 2 *B. & C.* 618, 871. A plea of misnomer of surname may be easily framed from the above. *See a precedent, Cr. Cir. C.* 46. *See also a precedent of a plea of no addition of degree or mystery, Cr. Cir. C.* 393; *false addition of place of residence*, 1 *Went.* 36.

The replication to this plea is in form thus:—"*And hereupon J. N.* [the clerk of the peace, or clerk of the arraigns], *who prosecutes for our said lady the Queen in this behalf, saith, that the said indictment, by reason of anything by the said James Long in his said plea above alleged, ought not to be quashed; because he saith, that the said James Long, long before and at the time of the preferring of the said indictment, was, and still is known as well by the name of George Long as by the name of John Long, to wit, at the parish aforesaid, in the county aforesaid; and this he the said J. N. prays may be inquired of by the country,*" &c. Instead of replying, the prosecutor may, if the grand jury be still sitting, alter the indictment, by substituting the name by which the defendant has pleaded for the name in the indictment, and have it preferred again and found, and the defendant again arraigned upon it; in which case, he will be estopped by his plea in abatement from again pleading a misnomer. This was formerly the practice; but a more effectual remedy is provided by the stat. 7 *G.* 4, *c.* 64, *s.* 19, which provides, that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied, by affidavit or otherwise, of the truth of such plea; but, in such case, the court shall forthwith cause the indictment or information to be amended according to the truth, and call upon the party to plead thereto, and proceed as if no such dilatory plea had been pleaded. (*See ante, p.* 30).

It is apprehended, however, that this statute does not affect the right of a peer, when indicted as a commoner, to plead in abatement

of an indictment for felony; for his title is not only part of his name, but gives him a different mode of trial, viz. by his peers.

This issue is generally proved thus: the defendant gives in evidence his certificate of baptism, with evidence of identity, or proves by parol evidence that he has always been called James, and not George; and the prosecutor, on the other hand, proves that upon some occasion he has assumed the name of George, or that he has usually gone by that name. But it may be questioned, perhaps, whether the proof of this issue be not entirely on the prosecutor. It is said, indeed, to have been decided, that, if a defendant allege in his plea that he was baptized by a certain name, he will be held to strict proof of that fact; 1 *Camp.* 479; but this is a mistake; for, even supposing the proof of the issue to be upon the defendant, he cannot be called upon to prove the inducement to his traverse, which is neither traversable nor traversed by the prosecutor.

The judgment for the Queen upon a plea of abatement, in misdemeanors, is final; in treason and felony, that the defendant do answer over. *R.* v. *Gibson,* 8 *East,* 107. The judgment for the defendant was formerly that the indictment may be quashed, but now the indictment may be amended, and the defendant called to plead thereto, as if no such dilatory plea had been pleaded.

## Sect. 4.

### DEMURRER.

Demurrers in criminal cases have hitherto seldom occurred in practice; because, before the recent statute, 7 *G.* 4, *c.* 64, *ss.* 20, 21, the defendant might have had the same advantage upon the plea of not guilty, or by motion in arrest of judgment, that he could have had upon demurrer. But that statute has made a most material alteration in the law in this respect, by enacting, (*s.* 20), "that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of the words 'against the form of the statutes,' or *vice versâ;* nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence;" and (*s.* 21). "that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it

describe the offence in the words of the statute." It is observable that this enactment applies only to felonies and misdemeanors, whether prosecuted by indictment or information, and that it does not extend to informations in the Crown Office, other than for misdemeanors, or to coroners' inquisitions; (but similar provisions are made, with respect to coroners' inquisitions, by the 6 & 7 *Vict. c.* 73); and that these objections, in cases to which the act applies, will no longer be available either in arrest of judgment, or on a writ of error. By pleading over, therefore, all these objections are waived; but they are still equally fatal if taken by demurrer. *Reg.* v. *W. Smith*, 2 *M. & Rob.* 109: *Reg.* v. *Law*, *Id.* 197: *Reg.* v. *Ellis*, *C. & Mar.* 564. And where a prisoner, in a case of felony, had, in his counsel's absence, pleaded to an indictment which was objectionable on demurrer, the judge, on the counsel's application, allowed him to demur, before the evidence was gone into. *Reg.* v. *Purchase*, *C. & Mar.* 617. But this will not be permitted in order to take advantage of a mere verbal objection. *Reg.* v. *Odgers*, 2 *M. & Rob.* 479. If the defendant succeed upon demurrer, the judgment is not stayed or reversed, but, on the contrary, is given in his favour; and the words "whether after verdict or outlawry, or by confession, default, or *otherwise*," do not extend the meaning of the clause beyond those cases in which the application is to stay or reverse the judgment. *See also R.* v. *Holland*, 4 *T. R.* 457. The following are forms of demurrers and joinders:—

*Demurrer to an Indictment or Information.*

"*And the said J. S. in his own proper person cometh into court here, and, having heard the said indictment* [or *information*] *read, saith, that the said indictment,* [or *information*], *and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he the said J. S. is not bound by the law of the land to answer the same; and this he is ready to verify: wherefore, for want of a sufficient indictment* [or *information*] *in this behalf, the said J. S. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment* [or *information*] *specified.*"

*Joinder.*

"*And J. N., who prosecutes for our said lady the Queen in this behalf, saith, that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said J. S. to answer the same; and the said J. N., who prosecutes as aforesaid, is ready to verify and prove the same, as the court here shall direct and award: wherefore, inasmuch as the said J. S. hath not answered to the said indictment, nor hitherto in any manner denied the same, the said J. N., for our said lady the Queen, prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified.*" The like form, *mutatis mutandis*, may be adopted in the case of informations, and of indictments in the Court of Queen's Bench.

*Demurrer to a Plea in Bar.*

"*And J. N., who prosecutes for our said lady the Queen in this behalf, as to the said plea of the said J. S. by him above pleaded, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to*

*bar or preclude our said lady the Queen from prosecuting the said indictment against him the said J. S.; and that our said lady the Queen is not bound by the law of the land to answer the same; and this he the said J. N., who prosecutes as aforesaid, is ready to verify: wherefore, for want of a sufficient plea in this behalf, he the said J. N., for our said lady the Queen, prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified."* The like form, *mutatis mutandis*, may be adopted in the case of informations, and of indictments in the Court of Queen's Bench. A demurrer to a plea in abatement is in the same form, except that it concludes with praying "*judgment, and that the said indictment may be adjudged good, and that the said J. S. may further answer thereto,*" &c.

*Joinder.*

"*And the said J. S. saith, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude our said lady the Queen from prosecuting the said indictment against him the said J. S.; and the said J. S. is ready to verify and prove the same, as the said court here shall direct and award: wherefore, inasmuch as the said J. N., for our said lady the Queen, hath not answered the said plea, nor hitherto in any manner denied the same, the said J. S. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.*" The joinder is the same, if the demurrer be to a plea in abatement, except that it concludes with praying "*judgment, and that the said indictment may be quashed,*" &c.

A demurrer upon the part of the Crown, or of the defendant, (provided it be not to a plea in abatement or some subsequent pleading thereupon), has the effect of laying open to the court not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; *Hob.* 56, *per Hobart;* 1 *Saund.* 284, *n.* 5; and if two or more of the pleadings be bad in substance, the court will give judgment against the party who committed the first fault. Thus, for instance, if the indictment be bad, there shall be judgment for the defendant, although the bar be also insufficient; *Pigot's case*, 5 *Co.* 29 *a;* or even if it appear upon the face of the record, that the court have no jurisdiction of the offence charged in the indictment, the defendant may take advantage of this matter upon the demurrer. *R.* v. *Fearnley*, 1 *T. R.* 316.

The judgment for the defendant upon demurrer is, that he be dismissed and discharged from the premises. The judgment against the defendant in misdemeanors is the same as upon demurrer in civil cases, *R.* v. *Taylor*, 5 *D. & R.* 422; 3 *B. & C.* 502, 612, and the Court has the same power of permitting the defendant afterwards to plead over; *Reg.* v. *Birmingham and Gloucester Railway Co.*, 3 *Q. B.* 224; but demurrers in felonies have hitherto been of such rare occurrence, that it is doubtful what judgment ought to be pronounced against the defendant. The older authorities go to shew that it is final; 2 *Hawk. c.* 31, *s.* 5; but by some this is doubted; and it is said, that *in favorem vitæ*, the defendant shall plead over to the felony. *Id. s.* 6; 2 *Hale*, 225, 257; 4 *Bl. Com.* 334; *R.* v. *Taylor*, 5 *D. & R.* 422; 3 *B. & C.* 502, 612: *R.* v. *Gibson*, 8 *East*, 107. In *Reg.* v. *Purchase*, *C. & Mar.* 617, *Patteson*, J., treated this as a matter beyond doubt; but in a subsequent case, in which that case was cited, *Tindal*, C. J., stated it to be still "a very doubtful point," whether this privilege extended to cases of felony not capital. *Reg.* v. *Bowen*, 1 *C. & K.* 504. In

several cases it has been ruled, indeed, that the defendant, in felony, may demur and plead over to the indictment *at the same time; Reg.* v. *Phelps, C. & Mar.* 181: *Reg.* v. *Adams, Id.* 299; but this was denied to be law in *Reg.* v. *Odgers,* 2 *M. & Rob.* 479.

An information may be amended after demurrer; *R.* v. *Holland,* 4 *T. R.* 457: *R.* v. *Wilkes,* 4 *Burr.* 2568; but an indictment, which is a finding upon the oaths of the grand jury, can only be amended with their consent before they are discharged. 2 *Hawk. c.* 25, *ss.* 97, 98.

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## Sect. 5.

### SPECIAL PLEAS IN BAR.

As all matter of excuse and justification may be given in evidence under the general issue, a special plea in bar seldom occurs in practice; in fact, the only instance (with the exception of the pleas of *auterfois acquit,* &c., which shall be treated of in the several divisions of this section) in which a special plea in bar seems requisite in criminal cases is, where a parish or county is indicted for not repairing a road or bridge, &c., and wishes to throw the *onus* of repairing upon some person or persons not bound of common right to repair it; in which case they must plead specially the liability of the party to repair, and the reason of his liability, so as to take the case out of the common-law rule, that every highway shall be repaired by the parish, and every bridge by the county in which it is situate. *See precedents of such pleas, post, Book* 2, *Chap.* 5, *Sect.* 2. The following are the forms of special pleas in bar, replications, and rejoinders:—

*Special Pleas.*

"*And the said J. S. in his own proper person cometh into court here, and, having heard the said indictment* [or *information*] *read, saith, that our said lady the Queen ought not further to prosecute the said indictment against him the said J. S.; because he saith, that,*" [&c., so proceeding to state the matter of the plea; and concluding thus]: "*And this he the said J. S. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.*"

*Replication.*

"*And hereupon J. N.* [the clerk of the peace, or clerk of the arraigns], *who prosecutes for our said lady the Queen in this behalf, says, that, by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says, that,*" [&c., so proceeding to state the matter of the replication; and concluding thus]: "*And this he the said J. N. prays may be inquired of by the country.*" Or, if it conclude with a verification, then thus: "*And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may be convicted of the premises in the said indictment above specified.*"

Where the plea is to an indictment in the Queen's Bench, the replication commences thus: "*And hereupon Peregrine Dealtry, Esquire, coroner and attorney of our said lady the Queen, in the court of our said lady the Queen, before the Queen herself, who prosecutes for our said lady the Queen in this behalf, says, that, by reason of,*" &c.;

and the conclusion thus: "*And this the said coroner and attorney of our said lady the Queen prays,*" &c., as above. Where the plea is pleaded to an information, the replication is thus: "*And the said Attorney-General* [or *coroner and attorney*] *of our said lady the Queen, who prosecutes as aforesaid, says, that, by reason of*" &c. "*And this the said Attorney-General* [or *coroner and attorney*] *of our said lady the Queen prays,*" &c., as above.

If the replication conclude to the country, the *similiter* is then added, in making up the record: "*And the said J. S. doth the like. Therefore let a jury come,*" &c., so proceeding with the award of the *venire.* But if the replication conclude with a verification, the defendant must then rejoin.

*Rejoinder.*

"*And the said J. S., as to the said replication of the said J. N. to the said plea by him the said J. S., saith, that our lady the Queen, by reason of anything by the said J. N. in that replication alleged, ought not further to prosecute the said indictment against him the said J. S.; because he saith, that*" [&c., so proceeding to state the matter of the rejoinder; and concluding thus:] "*And of this he the said S. puts himself upon the country.*" Or, if it be necessary to conclude with a verification, the conclusion may be in the same form as in a plea. (*Ante, p.* 86).

Having thus given the forms of special pleas, &c. generally, we shall now proceed to treat of those which usually occur in practice in this order:—



1. *Auterfois Acquit.*

When a man is indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and if he be thus indicted a second time, he may plead *auterfois acquit,* and it will be a good bar to the indictment. The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. *R.* v. *Clark,* 1 *B.* & *B.* 473. *See also R.* v. *Emden,* 9 *East,* 437; *R.* v. *Sheen,* 2 *C.* & *P.* 634.

Thus, an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods; because, upon the former indictment, the defendant might have been convicted of the larceny. But, if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny; 2 *Hale,* 245; *R.* v. *Vandercomb,* 2 *Leach,* 716; because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter; *Fost.* 329; 2 *Hale,* 246; because the defendant

might be convicted of the manslaughter on the first indictment. And now, it seems, an acquittal on an indictment for murder, committed in the perpetration of a burglary, (on which the prisoner might have been convicted of manslaughter, or even of assault, 7 *W*. 4 & 1 *Vict. c.* 85, *s.* 11), would be an answer to the allegation of violence in a subsequent indictment for burglary with violence, under the 7 *W*. 4 & 1 *Vict. c.* 86, *s.* 2. *Reg.* v. *Gould*, 9 *C.* & *P.* 364. So, formerly, *auterfois acquit* of petit treason was a good bar to another indictment for murder, and *e converso*, for the same reason. *Fost.* 325, 329; 2 *Hawk. c.* 35, *s.* 5. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder. *Fost.* 229; 4 *Co. Rep.* 466; *Holcroft's case*, 2 *Hale*, 246; 1 *Stark.* 305. And this rule is equally applicable, though the first indictment be against the defendant jointly with others, and the second against him alone; for upon the second indictment he may be convicted of an offence committed by him separately or jointly with others; and the plea avers the identity of the offence charged in both the indictments. *R.* v. *Dann*, 1 *Mood. C. C.* 424. An acquittal by a competent jurisdiction abroad is a bar to an indictment for the same offence before any other tribunal. *R.* v. *Hutchinson*, 1 *Leach*, 135; *Bull. N. P.* 245. But, in this case, the defendant should produce an exemplification of the record of his acquittal under the public seal of that state or kingdom where he has been tried and acquitted. *Hutchinson's case*, 3 *Keb.* 785; *and see Beak* v. *Thyrwhit*, 3 *Mod.* 194; 1 *Show.* 6; *Bull. N. P.* 245: *R.* v. *Roche*, 1 *Leach*, 134. Even an erroneous acquittal standing unreversed is a sufficient foundation for this plea. 9 *H.* 5, *c.* 2; 2 *Inst.* 318, 319; 2 *Hale*, 247.

But an acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county. *Vaux's case*, 4 *Co.* 45 *a*, 46 *b*; *Com. Dig.*, *Indictment*, (L). So, an acquittal upon an indictment for a felony is no bar to an indictment for a misdemeanor, and *e converso.* 2 *Hawk. c.* 35, *s.* 5. An acquittal on an indictment for larceny is no bar to an indictment for the same offence charged as a false pretence, notwithstanding the proviso in stat. 7 & 8 *G.* 4, *c.* 29, *s.* 53. *Reg.* v. *Henderson*, 1 *C.* & *Mar.* 329. An acquittal as accessary is no bar to an indictment as principal, and *e converso.* 2 *Hale*, 244; *Fost.* 361; 2 *Hawk. c.* 35, *s.* 11; *R.* v. *Barry*, 7 *C.* & *P.* 836. Where, therefore, to an indictment charging the defendant as an accessary before the fact to child murder, he pleaded *auterfois acquit* upon an indictment charging him with having been present, aiding and abetting in the said murder, the judges held that the plea was no bar, and had been properly overruled at the trial. *R.* v. *Birchenough*, 1 *Mood. C. C.* 477; 7 *C.* & *P.* 575. So, an acquittal (or judgment for the defendant on demurrer, *Reg.* v. *Richmond*, 1 *C.* & *K.* 240) upon an insufficient indictment, is no bar to another indictment for the same offence. 4 *Co.* 45 *a.* Where the defendant was indicted for forging a will, which was set out in the indictment thus: "*I John Styles*," &c., and was acquitted for variance, the will given in evidence commencing "*John Styles*," without the "*I*,"—it was holden that he could not plead this acquittal in bar of another indictment, reciting the will correctly, "*John Styles*," &c. *R.* v. *Coogan*, 1 *Leach*, 448. So, where to an indictment for keeping a gaming-house, *tempore G.* 4, the defendant pleaded that, at the sessions, 4 *G.* 4, he was indicted for keeping a gaming-house on the 18th January, 57 *G.* 3, and on divers other days and times between that day and the taking of the inquisition, against the peace of our lord

the said King, with an averment that the offence in both indictments was the same,—it was holden no bar, because the *contra pacem* tied the prosecutor to proof of an offence in the reign of *G.* 3, the only king named in that indictment. *R.* v. *Taylor*, 3 *B.* & *C.* 502. An insolvent debtor, who had been indicted for omitting goods out of his schedule and acquitted, afterwards pleaded *auterfois acquit* to another indictment for omitting other goods out of the same schedule; and *Patteson*, J., held, that the plea was no bar to the second indictment, but said that such a course ought not to be adopted except under very peculiar circumstances. *R.* v. *Champneys*, 2 *M.* & *Rob.* 25.

The following is the form of the plea of *auterfois acquit*:—

"*And the said J. S. in his own proper person cometh into court here, and, having heard the said indictment read, saith, that our said lady the Queen ought not further to prosecute the said indictment against the said J. S.; because he saith, that heretofore, to wit,* [at the general quarter sessions of the peace, holden at ——" so continuing the caption of the former indictment—"*it was presented that the said J. S., (then and there, and thereby described as J. S., late of* ——, *in the county aforesaid, labourer), on the third day of*," &c.; continuing the indictment to the end; reciting it, however, in the past, and not in the present tense. Recite also the remainder of the record to the end of the judgment in the past tense, in like manner. Then proceed thus]: "*As by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the said J. S. in fact saith, that he the said J. S., and the said J. S. so indicted and acquitted as last aforesaid, are one and the same person, and not other and different persons; and that the* [felony and larceny] *of which he the said J. S. was so indicted and acquitted as aforesaid, and the* [felony and larceny] *of which he is now indicted, are one and the same* [felony and larceny], *and not other and different* [felonies and larcenies]. *And this he the said J. S. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.*" The plea ought properly to be on parchment, signed by counsel: the court, however, will not reject the plea because it is informal, but will assign counsel to prepare it in a proper form for the defendant. *R.* v. *Chamberlain*, 6 *C.* & *P.* 93.

If the indictment be for felony or treason, the defendant, besides this plea of *auterfois acquit*, should also plead over to the felony, &c. *R.* v. *Vandercomb*, 2 *Leach*, 712. In such a case, therefore, continue the plea thus: "*And as to the felony and larceny of which the said J. S. now stands indicted, he the said J. S. saith, that he is not guilty thereof; and of this he the said J. S. puts himself upon the country.*" If, however, the defendant pleads *auterfois acquit* without pleading over to the felony, after his special plea is found against him, he may still plead over to the felony. 2 *Hawk.* c. 23, s. 128; *R.* v. *Sheen*, 2 *C.* & *P.* 634: *R.* v. *Welch, MS.*, 1828; *Car. Sup.* 56.

Where the offence is alleged in the two indictments to have been committed at different times or places, they are nevertheless sufficiently identified by the above general averment, that they are one and the same offence. But if one of the indictments appear to be for the murder of a person unknown, or for larceny of the goods of a person unknown, and the other for the murder of J. N., or for larceny of the goods of J. N., the plea should also aver that the per-

son so described as a person unknown, and J. N., are one and the same person, and not different persons. So, if one indictment be for the murder of J. N., or for larceny of the goods of J. N., and the other indictment be for the murder of J. G., or for larceny of the goods of J. G., the two offences may be identified by an averment that the said J. G. was known as well by the name of J. N. as J. G. *See* 2 *Hawk. c.* 35, *s.* 3. It may be necessary to observe, that the record of the former indictment and acquittal must be set out in the plea; otherwise it will be bad upon demurrer. *R.* v. *Wildey*, 1 *M. & Selw.* 183.

In the case of a plea of *auterfois acquit*, a jury are sworn *instanter* to try the issue; *R.* v. *Scott*, 1 *Leach*, 404; and therefore there is no replication actually pleaded upon the part of the Crown. *But see* 2 *C. & P.* 635. But a replication and *similiter* must be entered upon the record, when afterwards made up. The form may be thus: "*And hereupon A. B.* [the clerk of the peace, or clerk of arraigns], *who prosecutes for our said lady the Queen in this behalf, says, that, by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says, that there is not any record of the said supposed acquittal, in manner and form as the said J. S. hath above in his said plea alleged; and this he the said A. B. prays may be inquired of by the country. And the said J. S. doth the like. Therefore let a jury come,*" &c. Or, instead of tendering an issue as to the record, the prosecutor may, it should seem, tender an issue as to the identity of the party. The replication concludes to the country, and no day is given to bring in the record, as in civil actions; because, in criminal cases, there can be no trial by the record, it must be by jury only.

The proof of the issue lies upon the defendant. To prove it, he has merely to prove the record, in the manner pointed out hereafter, under the title *Evidence, Ch.* 2, *s.* 3; and secondly, to prove the averment of identity contained in his plea. *See* 2 *Russ.* 721, *n.* Where the second indictment is preferred at the same assizes, the original indictment and minutes of the verdict are receivable in evidence, in support of the plea of *auterfois acquit*, without a record being drawn up. *R.* v. *Parry*, 7 *C. & P.* 836. But where the previous acquittal was at a previous court in the same jurisdiction, or in a different jurisdiction, it can only be proved by the record. *R.* v. *Bowman*, 7 *C. & P.* 101, 337.

The judgment against the defendant, in felonies, is *respondeat ouster;* or rather, as the defendant generally pleads over to the felony at the same time with the issue in the plea of *auterfois acquit*, the jury are charged again to inquire of the second issue, and the trial proceeds as if no plea in bar had been pleaded. *R.* v. *Vandercomb*, 2 *Leach*, 708: *R* v. *Cogan*, 1 *Leach*, 448: *R.* v. *Sheen*, 2 *C. & P.* 635. In misdemeanors the judgment is final. *R.* v. *Goddard*, 2 *Ld. Raym.* 922; 2 *Hale*, 256. When the plea is allowed, the judgment is that the defendant shall go without day, and he is altogether discharged from the prosecution. 2 *Hale*, 391. *See* 1 *Deacon, p.* 90. The verdict for the prisoners on the issue in the plea cannot be set aside and a new trial had, although without evidence and against the opinion of the judge. *R.* v. *Lea*, 2 *Mood. C. C.* 9.

### 2. *Auterfois Convict.*

Formerly, a man convicted of a clergyable felony, and who had prayed the benefit of clergy, might plead such conviction and prayer of clergy in bar of any subsequent indictment, either for the felony of which he was convicted, or for any other clergyable felony committed by him previously to his conviction. *See stat.* 25 *Ed.* 3, *c.* 5; 8 *Eliz. c.* 4; 18 *Eliz. c.* 7; 2 *Hawk. c.* 36: *R.* v. *Jennings, R. & R.* 388; 1 *Stark.* 311. *See* 7 & 8 *G.* 4, *c.* 28, *s.* 6. By stat. 6 *G.* 4, *c.* 25, *s.* 4, the benefit of the allowance of clergy was restricted to the individual charge upon which it was allowed; and now, a previous conviction can only be pleaded in bar of any subsequent indictment for the felony of which the defendant has previously been convicted. *See* 4 *Bl. Com.* 336; 2 *Hale,* 251; *Vaux's case,* 4 *Co.* 45 *a.* The same rules apply generally to this plea as to the plea of *auterfois acquit.*

Analogous to the defences of *auterfois acquit* and *auterfois convict,* is the defence that the defendant has before been convicted or discharged under the stat. 9 *G.* 4, *c.* 31, *s.* 27. That section enacts, that any person committing any *assault and battery* may be adjudged, on conviction thereof before two justices of the peace, to pay a fine not exceeding 5*l.*, with costs, or may be committed for a term not exceeding two calendar months, unless the fine and costs be sooner paid; but if the justices, upon the hearing of any such case, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, they shall forthwith (*i. e.* before they separate, *Reg.* v. *Robinson,* 12 *Ad. & E.* 672; 4 *P. & D.* 319) make out a certificate under their hands, stating the fact of such dismissal, and shall deliver the certificate to the party against whom the complaint was preferred. By *s.* 28, if the party shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or suffered the imprisonment awarded for the non-payment, he shall be released from all farther or other proceedings, civil or criminal, *for the same cause.* But by *s.* 29, the justices are prohibited from adjudicating on any assault or battery which they shall find to have been accompanied by any attempt to commit felony, or which they shall think, from any other circumstance, to be fit subject for prosecution by indictment, or in which any question arises as to the title to land, &c., or as to any bankruptcy, insolvency, or execution. This defence must be specially pleaded. The form of the plea may be as follows:—

"*And the said J. S. in his own proper person cometh into court here, and, having heard the said indictment read, saith, that our said lady the Queen ought not further to prosecute the said indictment against him the said J. S. in respect of the offence in the said indictment mentioned, because he saith, that heretofore, to wit, on the —— day of ———, in the year of our Lord ———, at the parish of ———, in the county of ———, he the said J. S. was, upon the complaint of &c.* [reciting the information before the magistrates in the past tense], *convicted before the said A. B., clerk, and the said C. D., Esq., two of her Majesty's justices of the peace in and for the said county, for that he the said J. S. did, within three calendar months then last past, to wit, on &c. at &c., with force and arms, unlawfully assault and beat the said J. N., in the peace of our said lady the Queen then and there being, contrary to the statute in that case made and provided; and the said justices did then and there adjudge the said J. S. for this said offence to forfeit and pay the sum*

*of 5l. of lawful money of Great Britain; and, in default of immediate payment of the said sum of 5l. by the said J. S. as aforesaid, they the said justices did adjudge the said J. S. to be imprisoned in the house of correction for the said county for the space of two calendar months, unless the said sum of 5l. should be sooner paid; and the said justices did direct that the said sum of 5l. should be paid to E. F., one of the overseers of the poor of the parish of ——— aforesaid, in which parish the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided, as by the record of the said conviction more fully and at large appears; which said judgment and conviction still remains in full force and effect, and not in the least reversed or made void. And the said J. S. further saith, that the assault and battery of the said J. N., of which he the said J. S. was so convicted as aforesaid, and the stabbing, cutting, and wounding of the said J. N. in the said indictment mentioned, are one and the same assault and battery, and not other and different. And he the said J. S. further saith, that he the said J. S. hath duly paid the whole amount of the said sum of 5l. so adjudged by the said justices to be paid under the said conviction as aforesaid to the said E. F., &c., being such overseer of the said parish of ——— as aforesaid. And this he the said J. S. is ready to verify; wherefore he prays judgment if our said lady the Queen ought further to prosecute the said indictment against him the said J. S. in respect of the said offence in the said indictment mentioned, and that he the said J. S. may be dismissed and discharged from the same. And as to the felony aforesaid in the said indictment mentioned, the said J. S. saith that he is not guilty thereof, and therefore he puts himself upon the country,"* &c. If the complaint was dismissed by the justices, the plea must be framed accordingly.

The replication may be as follows:—"*And hereupon A. B.* [the clerk of the peace, or clerk of arraigns], *who prosecutes for our said lady the Queen in this behalf, says, that, by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says, that there is not any record of the said supposed conviction, in manner and form as the said J. S. hath above in his said plea alleged; and this he the said A. B. prays may be inquired of by the country,"* &c. [In the case of a dismissal of the complaint by the justices, the replication should traverse the fact of the granting of the certificate.] *See Reg.* v. *Robinson*, 12 *Ad. & E.* 672; 4 *Per. & D.* 397: *Reg.* v. *Walker*, 2 *M. & Rob.* 446. It was decided in the latter case, that a plea of a conviction or acquittal under the 9 *G.* 4, *c.* 31, *s.* 27, is a bar to an indictment for a felonious stabbing, &c., in the same transaction; for the justices are to determine whether the assault was accompanied by any felonious transaction, and their decision on that is final. The production of the certificate is of itself sufficient evidence of the discharge by the justices, without proof of their signature or official character. 8 & 9 *Vict. c.* 113, *s.* 1.

### 3. *Auterfois Attaint.*

Before the recent stat. 7 & 8 *G.* 4, *c.* 28, *s.* 4, if a man were attainted of treason or felony whilst the attainder remained in force, he could not, with certain exceptions, be indicted for another felony, whether such other felony were committed before or after his attainder; because, being already attainted, and therefore dead in contemplation of law, and his property forfeited, a prosecution for

any other offence was considered useless. But now attainder is no bar, unless for the same offence as that charged in the indictment, 7 *&* 8 *G.* 4, *c.* 28, *s.* 4, and, in effect, the plea of *auterfois attaint* is at an end. 4 *Bl. Com.* 337, *n.*

Tho same rules apply to this plea as to the plea of *auterfois acquit*, with respect to the pleading and production of the record, the averments of identity, and the proceedings on the plea at the trial.

### 4. *Pardon.*

A pardon may be pleaded in bar to the indictment; or, after verdict, in arrest of judgment; or, after judgment, in bar of execution. But it must be observed, that it is necessary to plead it at the first opportunity the defendant may have of so doing; if, for instance, he have obtained a pardon before arraignment, and, instead of pleading it in bar, he plead the general issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment. *R.* v. *Norris*, 1 *Rol. Rep.* 297; 2 *Keb.* 25. What has now been mentioned, however, relates to the Queen's pardon only; for a statute pardon need not be pleaded, *Fost.* 43; *Standf.* 103 *a*; 3 *Inst.* 234; *Plowd.* 83, 84, unless there be exceptions in it; 2 *Hale*, 252; 3 *Inst.* 334; nor can the defendant lose the benefit of it by his own laches or negligence.

Formerly pardon could only be pleaded under the great seal; *Lord Warwick's case*, 13 *St. Tr.* 1015: *R.* v. *Gully*, 1 *Leach*, 98: *Bull* v. *Tilt*, 1 *B. & P.* 199. *See R.* v. *Beaton*, 1 *W. Bl.* 479: *R.* v. *Miller*, 2 *W. Bl.* 799: *Bullock* v. *Dodds*, 2 *B. & Ald.* 258; in which case the letters patent are set out with *profert*, and the plea concludes thus:—"*By reason of which said letters patent, the said J. S. prays that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.*" But now, in the case of a free or conditional pardon, under the Queen's sign manual, countersigned by one of the secretaries of state, the discharge of the offender from custody in the former case, or the performance of the condition in the latter, has the effect of a pardon under the great seal as to the felony for which the pardon is granted, but will not prevent or mitigate the punishment in any subsequent conviction for any felony committed after the granting any such pardon. 7 *&* 8 *G.* 4, *c.* 28, *s.* 13. *See* 6 *G.* 4, *c.* 25, *s.* 1; 9 *G.* 4, *c.* 32, *s.* 3. If there be any variance in the description of the offence or party between the pardon and the indictment, it may be made good in the plea, by averments of identity, in the same manner as in the plea of *auterfois acquit*. (*See ante*, *p.* 89).

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## Sect. 6.

### GENERAL ISSUE.

The general issue is pleaded by the prisoner *vivâ voce* at the bar, in these words, "*not guilty*;" by which plea, without further form, every person, not having privilege of peerage, upon being arraigned upon any indictment for treason, felony, or piracy, is deemed to have put himself upon the country for trial. 7 *&* 8 *G.* 4, *c.* 28, *s.* 1. And, if any person being arraigned upon, or charged with, any indictment or information for treason, felony, piracy, or misdemeanor,

shall stand mute of malice, or will not answer directly to the indictment or information, the court may order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same. 7 & 8 *G.* 4, *c.* 28, *s.* 2. A prisoner, who had been previously tried and convicted, but whose trial was deemed a nullity on account of some informality in swearing the witnesses, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had been already tried: *Littledale*, J., and *Vaughan*, B., ordered a plea of not guilty to be entered for him under this section. *R.* v. *Bitton*, 6 *C.* & *P.* 92. A person deaf and dumb was to be tried for a felony: the judge ordered a jury to be impannelled, to try whether he was mute by the visitation of God; the jury found that he was so: they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant by a sign pleaded not guilty: the judge then ordered the jury to be impannelled to try whether the defendant was now sane or not, and, on this question, directed them to say whether the defendant had sufficient intellect to understand the course of the proceedings, to make a proper defence, to challenge the jurors and comprehend the details of the evidence, and that if they thought he had not, they should find him of non-sane mind. *R.* v. *Pritchard*, 7 *C.* & *P.* 303. When the record is made up, the general issue appears upon it thus: "*And he the said J. S. forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith, that he is not guilty thereof.*" And the *similiter* is then added thus: "*And J. N.* [the clerk of the peace, or clerk of arraigns], *who prosecutes for our said lady the Queen in this behalf, doth the like. Therefore let a jury come,*" &c., so proceeding with the award of the *venire*. Where a prisoner has pleaded guilty to a charge of felony, and sentence has been passed upon him, he cannot afterwards retract his plea and plead not guilty. *Reg.* v. *Sell*, 9 *C.* & *P.* 346.

In informations, and in indictments for not repairing roads and bridges, &c., where the defendant is allowed, *ex gratiâ*, to appear by attorney, the general issue is regularly ingrossed, and filed with the proper officer. It is in form thus: "*And the said J. S., by A. B. his attorney, cometh into court here, and, having heard the same indictment* [or *information*] *read, saith, that he is not guilty of the said premises in the said indictment* [or *information*] *above specified and charged upon him; and of this the said J. S. puts himself upon the country.*" Afterwards, in making up the record, the *similiter* is added thus: "*And J. N., who prosecutes for our said lady the Queen in this behalf, doth the like,*" if it be pleaded to an indictment at the assizes or sessions; but if to an indictment in the Queen's Bench, then thus: "*And Christopher Robinson, Esquire, coroner and attorney of our said lady the Queen, in the court of our said lady the Queen before the Queen herself, who prosecutes for our said lady the Queen in this behalf, doth the like;*" or if to an information, then thus: "*And the said Attorney-General* [or *coroner and attorney*] *of our said lady the Queen, who prosecutes as aforesaid for our said lady the Queen, doth the like.*"

The general issue makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment or information. On the other hand, the defendant may give in evidence, under this plea, not only every thing which nega-

*tives the allegations in the indictment, but also all matter of* excuse and justification.

If the defendant gives any evidence, whether written or parol, the counsel for the prosecution has the right of reply. Even if the evidence for the defendant be only to his character, it gives, in strictness, a right of reply, although it is seldom exercised in such case. (*See post, p.* 152). If two prisoners are indicted jointly for the same offence, and one call witnesses, it seems that the counsel for the prisoner is entitled to a general reply; but if the offences are separate, and they might have been separately indicted, he can reply only on the case of the party who has called witnesses. *Reg.* v. *Hayes*, 2 *M.* & *Rob.* 155: *Reg.* v. *Jordan*, 9 *C.* & *P.* 118. Wherever the defendant gives evidence to prove new matter by way of defence, which the Crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply, to contradict it. *See Reg.* v. *Frost*, 9 *C.* & *P.* 159.

# PART II.

## EVIDENCE GENERALLY.

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## CHAPTER I.

### WHAT ALLEGATIONS MUST BE PROVED.

WHERE the defendant pleads the general issue, not guilty, the prosecutor is obliged to prove at the trial every fact and circumstance stated in the indictment which is material and necessary to constitute the offence. So, where the replication or other pleading on the part of the prosecution consists of a general traverse of the defendant's pleading, the defendant must prove the facts thus traversed and put in issue. The parts of a pleading required to be thus proved may be considered under the following heads:—

*Time.*]—The day and year on which facts are stated in the indictment or other pleading to have occurred are not in general material; and the facts may be proved to have occurred upon any other day previous to the preferring of the indictment. (*See ante, p.* 40). *R.* v. *Charnock*, *Holt*, 301; 1 *Salk.* 288; 9 *St. Tr.* 587—605, 542—552; *Fost.* 7, 8; 9 *East*, 157; 1 *Phil. Ev.* 203: *R.* v. *Levy*, 2 *Stark. N. P.* 458. To this rule, however, there are these acceptions: namely, *First*, that in all cases where bills of exchange, promissory notes, or other written instruments, not under seal, are pleaded, the date, if stated, must correspond with the date of the instrument when produced in evidence at the trial. *Coxon* v. *Lyon*, 2 *Camp.* 307, *n.* *See Freeman* v. *Jacob*, 4 *Camp.* 209. *Secondly*, as deeds may be pleaded either according to the date which they bear, or to the day on which they were delivered, if a deed produced in evidence bear date on a day different from that stated in the pleading, the party producing it must prove that it was in fact delivered on the day alleged in the pleading. *Thirdly*, if any time stated in a pleading is to be proved by matter of record, it must be correctly stated. *See Grey* v. *Bennet*, 1 *T. R.* 656: *Pope* v. *Foster*, 4 *T. R.* 590: *Woodford* v. *Ashley*, 11 *East*, 508: *Rastall* v. *Stratton*, 1 *H. Bl.* 49; 2 *Saund.* 291 *b.* In these several respects, any—the slightest—variance between the time so stated, and that appearing from the instrument or record when produced, will, in felonies, be fatal; but, in misdemeanors, the variance may, in certain cases, be amended at trial. 9 *G.* 4, *c.* 15. (*See post, p.* 103). *Fourthly*, when the precise date of any fact is necessary to ascertain and determine with precision the offence charged, or the matter alleged in excuse or justification, any—the slightest—variance between the pleading and evidence in that respect will be fatal. And *lastly*, where time is of the essence of the offence, as in burglary or the like, the offence must be proved to have been committed in the night-time; although the day on which the offence is charged to have

been committed is immaterial, and it may be proved to have been committed on any other day previous to the preferring of the indictment. In murder, also, the death must be proved to have taken place within a year and a day from the time at which the stroke is proved to have been given. 2 *Hawk. c.* 23, *s.* 90.

*Place.*]—It is not in general necessary to prove that the facts stated in the indictment or subsequent pleading occurred in the parish or place therein alleged; it is sufficient to prove that they occurred within the county or other extent of the court's jurisdiction. 2 *Hawk. c.* 25, *s.* 84, (*ante, p.* 40). But they must be proved to have been committed within the county, or other extent of the court's jurisdiction, otherwise the defendant must be acquitted. (*See ante, p.* 38). And where a forged bill of exchange was found upon J. S., who resided in Wiltshire, and had resided there about a year under a false name, but which bill bore date more than two years previously to its being found upon him, and at a time when he lived in Somersetshire; on an indictment against him for a forgery of the bill in Wiltshire, this was holden not to be sufficient evidence of the offence having been committed in that county. *R.* v. *Crocker*, 2 *New Rep.* 87: *see R. & R.* 99, *n.* But although the offence must be proved to have been committed in the county where the prisoner is tried, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evidence. 1 *Ph. Ev.* 206. If there be no such place as that stated in the indictment, it is immaterial. *R.* v. *Woodward*, 1 *Mood. C. C.* 323. The stat. 9 *H.* 5, *st.* 1, *c.* 1, *s.* 3, (*see* 7 *H.* 5. *c.* 18, *and* 18 *H.* 6, *c.* 12), which declared the indictment to be void in such a case, is now repealed; and a further ground for the objection is removed by the jury in criminal cases being now returned *de corpore comitatûs.* 6 *G.* 4, *c.* 50, *s.* 20. An indictment alleged a highway robbery to have been committed in the parish of *St. Thomas Pensford*, but the witness called it the parish of *Pensford*, upon which it was objected that there was no proof that there was in the county any such parish as that laid in the indictment: *Littledale*, J., before whom the indictment was tried, said, that the objection was not valid, and that he had once reserved a case for the opinion of the judges upon the very point, and a great majority of the judges held that it was not incumbent upon the prosecutor to prove affirmatively the existence within the county of the parish laid in the indictment, and expressed a doubt how they should hold, even where it was proved negatively for the prisoner, that no such parish existed. *R.* v. *Dowling*, *Ry. & M. N. P.* 433.

To the above rule, as to the parish and place being immaterial, there are, however, these exceptions: namely, *First*, that if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. *Secondly*, upon an indictment against a parish for not repairing a road, the part of the road out of repair must be proved to be within the parish; and the same in all other cases in which the place where the fact occurred is a necessary ingredient in the offence. *Thirdly*, if a place mentioned in pleading be stated as part of the description of a written instrument, or is to be proved by matter of record, any—the slightest—variance between the place as stated, and that appearing from the written instrument or record when produced, will, in felonies, be fatal: *see Pitt* v. *Green*, 9 *East*, 188: *Pool* v. *Court*, 4 *Taunt.* 700: *Goodtitle* v. *Walter*, *Id.* 761: *Morgan*

v. *Edwards*, 6 *Taunt.* 394: *Goodtitle* v. *Lammiman*, 2 *Camp.* 274; but, in misdemeanors, the variance may be amended at the trial. 9 *G.* 4, *c.* 15. (*See post, p.* 103). And *lastly*, where the place is stated as matter of local description, and not as venue merely, the slightest variance between the description of it in the indictment and the evidence will be fatal; even though the injury be partly local, and partly transitory; for, the whole being one entire fact, the local description becomes descriptive of the transitory injury. *R.* v. *Cranage*, 1 *Salk.*.385; 2 *Stark. Ev.* 1571. Thus, for instance, on an indictment for stealing in the dwelling-house, &c., for burglary, for forcible entry, or the like, if there be the slightest variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted. The rule is the same, in this respect, in criminal cases as in civil actions; and where, in an action for non-residence, the parish was styled in the declaration *St. Ethelburg*, and the real name appeared in evidence to be *St. Ethelburga*, it was holden a fatal variance. *Wilson* v. *Gilbert*, 2 *B. & P.* 281. So, in an action for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water, called T., the variance is fatal. *Shaw* v. *Wrigley*, 2 *East*, 500. With reference to the description of the parish, there are several apparently conflicting authorities, which can only be reconciled upon the principle that it is sufficient to describe the parish either by its strict legal or popular name, provided the description be such as cannot mislead. Thus where, in ejectment, the premises were alleged to be in *Farnham*, and proved to be in *Farnham Royal*, it was holden not to be a fatal variance, unless it were shewn that there were two *Farnhams*. *Doe* v. *Salter*, 13 *East*, 9. Where the premises were laid to be in *Westbury*, and it was proved that there were two parishes of that name in the county, *Westbury-upon-Trim* and *Westbury-upon-Severn*, the objection of variance was overruled, because in common parlance the addition was not used, and the description could not mislead. *Doe* v. *Harris*, 5 *M. & Sel.* 326. So, where premises were described as situate in the parish of *Lambeth*, the real name of the parish being *St. Mary, Lambeth*, though usually called *Lambeth*, the variance was holden to be immaterial. *Kirkland* v. *Pounset*, 1 *Taunt.* 570: *R.* v. *Glossop*, 4 *B. & Ald.* 619. In *Taylor* v. *Willans*, 11 *B. Moore*, 448; 3 *Bingh.* 449, the parish was described as the parish of *St. James*, in the county of *Middlesex*, and it appeared, from acts of Parliament, that there were two parishes of *St. James*, the one *St. James, Clerkenwell*, and the other, that laid in the declaration, sometimes called *St. James*, and sometimes *St. James in the liberties of Westminster;* upon which ground the description was holden sufficient. And where, in ejectment, the premises were alleged to be in the parish of *St. Luke*, in the county of *Middlesex*, and there appeared to be two parishes of *St. Luke*, the one *St. Luke, Chelsea*, and the other, that in which the premises were, sometimes called *St. Luke, Old Street*, but more commonly *St. Luke, Middlesex;* the description was holden sufficient, as it could not mislead. *Doe* v. *Carter*, 2 *Y. & J.* 492. A prisoner was indicted at the Central Criminal Court for burglary in a house stated in the indictment to be situate at the parish of *Woolwich*. The prosecutor stated that the correct name of the parish was *St. Mary, Woolwich;* but it being called in the Central Criminal Court Act, 4 & 5 *W.* 4, *c.* 36, *s.* 2, the parish of *Woolwich*, the indictment was therefore held sufficient. *Reg.* v. *St. John*, 9 *C. & P.* 40. But where,

in an action of trespass for breaking a house in the parish of *Clerkenwell*, there appeared to be two parishes in *Clerkenwell*, *St. James* and *St. John*, and the house was situate in the former, *Gibbs*, C. J., nonsuited the plaintiff. *Taylor* v. *Hooman*, 1 *B. Moore*, 161; 1 *Holt*, 523. And where the premises were laid in the parish of *St. George the Martyr, Bloomsbury*, and were proved to be in that of *St. George, Bloomsbury*, there being two parishes of *St. George* in *Bloomsbury*, the one called *St. George the Martyr*, and the other *St. George, Bloomsbury*, the plaintiff was nonsuited. *Harris* v. *Cooke*, 2 *B. Moore*, 587; 8 *Taunt.* 539.

Where a parish is situated in two counties, it is sufficient to describe it as being in the county in which the offence is committed; *R.* v. *Perkins*, 4 *C. & P.* 363; unless the offence be of a local nature, in which case it must be alleged to have been committed in *that part* of the parish which is within the county in which the defendant is tried. *Reg.* v. *Brookes*, *C. & Mar.* 543.

*The Offence charged.*]—Every offence consists of certain acts done or omitted, under certain circumstances, all of which must be stated in the indictment, (*see ante, p.* 41), and be proved as laid; any material variance between the fact laid and the fact proved will be fatal. Thus, for instance, where, in an indictment for obtaining money by false pretences, the false pretence stated was, that the defendant said that *he had paid* a sum of money into the bank, and the proof was, that he said that a sum of money had been paid into the bank, without saying by whom, the defendant was acquitted for the variance, Lord *Ellenborough* holding that there was a difference in substance between the two assertions. *R.* v. *Plestow*, 1 *Camp.* 494. In an indictment for larceny, the evidence must correspond strictly with the indictment as to the species of goods stolen; as, for instance, an indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of a pair of boots. Where an indictment (on the repealed stat. 15 *G.* 2, *c.* 34, and 14 *G.* 2, *c.* 6, which made it felony without benefit of clergy to steal any cow, ox, heifer, &c.) charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was holden to be a fatal variance; for the statute having mentioned both cow and heifer, proved that the words were not considered by the legislature as synonymous. *R.* v. *Cooke*, 2 *East, P. C.* 617; 1 *Leach*, 123. *See also R.* v. *Douglas*, 1 *Camp.* 212. In like manner it was decided, that, as the statute specified lambs and sheep, an indictment for stealing lambs was not proved by evidence of stealing sheep; *R.* v. *Loom*, 1 *Mood. C. C.* 160; and, for the same reason, it has been holden, upon the stat. 7 & 8 *G.* 4, *c.* 29, *s.* 25, that an indictment for stealing a sheep is not supported by proof of stealing an ewe. *R.* v. *Puddifoot*, 1 *Mood. C. C.* 247: *R.* v. *Birket*, 4 *C. & P.* 216: *but see Reg.* v. *M'Culley*, 2 *Mood. C. C.* 34, (*ante, p.* 51), *contra.* Where an indictment upon the repealed stat. 43 *G.* 3, *c.* 58, charged the defendant with cutting J. S., and the evidence proved a stabbing, the variance was holden fatal, for the statute used the alternative, stab or cut. *R.* v. *M'Dermot*, *R. & R.* 356. Upon an indictment for perjury, the oath was alleged to have been taken at the assizes before justices assigned to take the assizes, and it was holden a fatal variance that the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery. *R.* v. *Lincoln*, *R. & R.* 421. *See R.* v. *Alford*, 14 *East*, 218, *and R.* v.

*Cooke*, 7 *C. & P.* 559. And where an indictment for being at large after an order for transportation stated that his Majesty had extended his mercy to the prisoner, upon condition of transportation for life beyond the seas, and the condition upon which he received the royal mercy was not general, but specific, that he should be transported to New South Wales, or some of the islands adjacent, it was holden a fatal variance. *R.* v. *Fitzpatrick*, *R. & R.* 512. So, an indictment for killing by striking will not be supported by proof that the defendant knocked the deceased down, and that, by falling to the ground, he received the injury which caused his death. *R.* v. *Kelly*, 1 *Mood. C. C.* 113: *R.* v. *Thompson*, *Id.* 139. But it will be sufficient if the evidence agree in substance with the allegation in the indictment. Thus, for instance, upon an indictment for murder, if it appear that the party was killed by a weapon different from that described, it will support the indictment; as if a wound or bruise, alleged to have been given with a sword, be proved to have been given with a staff; or if the death be stated to have been caused by one sort of poison, and be proved to have been occasioned by another; provided the death be caused by means *ejusdem generis*. (*See post, title Murder*). So, a variance in the number of articles, or in their value, is immaterial, provided the value proved be sufficient to constitute the offence in law. And if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more, it will be sufficient, although he fail in his proof of the rest; except in a case where value is essential to constitute the offence, and the value is ascribed to all the articles *collectively;* for in that case the offence must be made out as to every one of the articles. *R.* v. *Forsyth*, *R. & R.* 274.

An allegation which need not be made does not require proof; and therefore, upon an indictment for wounding, with intent, &c., which alleged the fact to have been done with a stick and kicking, it was holden that the means stated were mere surplusage. *R.* v. *Briggs*, 1 *Mood. C. C.* 318; (*see post, p.* 107).

The names of the persons against whom the offence was committed, and of any party whose existence is legally essential to the charge, must be strictly proved as laid. (*See ante, p.* 30). Thus, in an indictment for larceny, the property in the goods must be strictly proved as laid; that is, the person whose goods they are alleged to be must be proved to be either the actual owner or the bailee of them. (*See ante, p.* 31). Even where an indictment for burglary charged the defendant with breaking and entering the house of J. D. with intent to steal the goods of J. W., and it appeared in evidence that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake, the judges held that the variance was fatal, and the defendant was accordingly acquitted. *R.* v. *Jenks*, 2 *East, P. C.* 514. So, if it appear in evidence that the alleged owner of the goods is a *feme covert*, the defendant must be acquitted; 1 *Hale*, 513; for they are in law the goods of her husband. So, if a burglary be alleged to have been committed in the house of J. G., and it turn out in evidence to be the dwelling-house of J. S., the defendant must be acquitted for the variance. *R.* v. *White*, 1 *Leach*, 252. So, if a larceny be alleged to have been committed in the house of J. G., and it turn out in evidence to be the dwelling-house of J. S., the defendant must be acquitted of the stealing in the dwelling-house, and can be found guilty of the simple larceny merely. So, in all other cases, a material variance between the indictment

and evidence, in the name of the party injured, will be fatal, and the defendant must be acquitted. But the party injured may, as we have seen, (*ante, p.* 31), be described either by his real name, or by that by which he is usually known. *R.* v. *Norton, R. & R.* 150: *R.* v. *J. Williams*, 7 *C. & P.* 298. And if the name proved be *idem sonans* with that in the indictment, and different in spelling only, the variance will be immaterial. Thus, "Segrave" for "Seagrave," *Williams* v. *Ogle*, 2 *Str.* 889; "Benedetto" for "Beniditto," *Abitbol* v. *Beniditto*, 2 *Taunt.* 401; and "Whyneard" for "Winyard," pronounced "Winnyard," *R.* v. *Foster, R. & R.* 412, is no variance; but it has been decided that "M'Cann" and "M'Carn," *R.* v. *Tannett, R. & R.* 351; "Shakespeare" and "Shakepear," *R.* v. *Shakespeare*, 10 *East*, 83; "Tabart" and "Tarbart," *Bingham* v. *Dickie*, 5 *Taunt.* 814; and "Shutliff" and "Shirtliff," 1 *Chit.* 216, are not the same in sound. If the prosecutor be described with an addition, though unnecessary, it must be proved. *R.* v. *Deeley*, 1 *Mood. C. C.* 303. So, if he be described as a person to the jurors unknown, and it appear in evidence that his name is known, the defendant will be acquitted. *See R.* v. *Walker*, 3 *Camp.* 264: *R.* v. *Robinson*, 1 *Holt*, 595. And where, in an indictment for receiving stolen goods, the principal felon was described as a person to the jurors unknown, but it appeared in evidence that he was known, the receiver was acquitted for the variance. *R.* v. *Walker*, 3 *Camp.* 264. But a bill found by the same grand jury, imputing the principal felony to J. S., does not, sufficiently for this purpose, prove that J. S. committed the felony. *R.* v. *Bush, R. & R.* 372.

Sums of money stated in an indictment need not be proved as laid, *see R.* v. *Gilham*, 6 *T. R.* 265, unless they form part of the description of a written instrument, or the exact sum be of the essence of the offence.

Records produced in evidence must be strictly conformable with the statement in the pleading they are intended to prove; the slightest variance in substance between the matter set out and the record produced in evidence, will, in felonies, be fatal; but, in misdemeanors, the variance may be amended at the trial. 9 *G.* 4, *c.* 15; (*post, p.* 103). The rule in criminal cases, in this respect, is the same as in civil actions. (*See ante, pp.* 46, 96). Thus, in an action for a malicious prosecution, the declaration having stated that the indictment afterwards, to wit, on the 25th February, 1791, came on to be tried, and by the record, when produced, the trial appeared to have been on a different day, the plaintiff was nonsuited, although the day was laid under a *videlicet*. *Pope* v. *Foster*, 4 *T. R.* 590: *cont.*, *Purcell* v. *M'Namara*, 9 *East*, 157: *acc. Woodford* v. *Ashley*, 11 *East*, 508; 2 *Saund.* 291 *b*. So, an allegation that the plaintiff was acquitted by a jury in the court of our lord the King before the King himself at Westminster, before the Chief Justice, and discharged thereupon by the court, was holden not to be proved by a record stating the trial to have been at *Nisi Prius*, and the plaintiff to have been discharged by the court in banc. *Woodford* v. *Ashley*, 2 *Camp.* 193; 11 *East*, 508. So, where the return of a writ was laid to be in the 25th year of the King's reign, (under a *videlicet*), and the writ itself appeared to be returnable in the 24th year, the court held the variance to be fatal. *Green* v. *Rennett*, 1 *T. R.* 656. So, where an indictment for perjury, assigned on an affidavit made for the purpose of setting aside a judgment, alleged that the judgment was entered up "in or as of" Trinity Term, 5 Will. 4; and, on an

examined copy of the record being produced, it appeared that the day on which the judgment was signed was entered in the margin, according to the new rules of practice of Hil. T., 4 Will. 4, this was held a fatal variance, and the judge refused to amend under the statute 9 *G.* 4, *c.* 15. *R.* v. *Cooke,* 7 *C. & P.* 559. So where, on a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a Chancery suit, the indictment stated that the four commissioners named in the commission were commanded to examine the witnesses; but the commission, when put in, appeared to authorise the commissioners, "or any two or three of them," to examine the witnesses, this was holden a fatal variance, and the judge refused to amend. *Reg.* v. *Hewins,* 9 *C. & P.* 786. So, where an indictment for perjury, alleged to have been committed on the trial of an action of debt in the county court, stated, in one count, that the county court was held before A. B., the high sheriff, and the oath sworn before him; in a second, that it was held before C. D., the county clerk, and the oath sworn before him; and in a third, that it was held before C. D., so being such county clerk as aforesaid, and the suitors [naming them], and the oath sworn before C. D., so being such county clerk as aforesaid, and the said E. F., &c., suitors of the said court of the said sheriff as aforesaid; it was held bad, the county court being misdescribed in each count: for that court is the court *of* the sheriff, *held before* the suitors. *Reg.* v. *Fellowes,* 1 *C. & K.* 112. *See Jones* v. *Jones,* 5 *M. & W.* 523. But where an indictment for perjury stated that a certain cause (in which the perjury was alleged to have been committed) was tried at the assizes before E. W., one of the judges, &c., it was holden to be proved in substance by the *nisi prius* record, which stated, in the usual form, that the cause was tried before the two justices of assize, one of whom was E. W. *R.* v. *Alford,* 14 *East,* 218, *n.* So, where an indictment for perjury alleged the trial of an issue before A. B., sheriff of D., by virtue of a writ of trial, directed to the said sheriff; the writ was directed to the sheriff, and the return was of a trial before him; but it was proved that in fact the trial took place before a deputy, not the under-sheriff; this was held no variance. *Reg.* v. *Dunn,* 2 *Mood. C. C.* 297; 1 *C. & K.* 730. An indictment stated that, at the assizes held, &c., C. P., "together with one T. P., was" in due form of law tried and convicted on an indictment depending against them for uttering counterfeit coin, and thereupon it was considered by the court there that C. P. should be imprisoned for two years. The record stated the conviction of C. P. and the acquittal of T. P. It was held that there was no variance, for that the allegation in the indictment did not import that T. P. was convicted. *Reg.* v. *Page,* 9 *C. & P.* 756; 2 *Mood. C. C.* 219. *See* 1 *T. R.* 237, *n.*; 240, *n.*

Where the matter of a written instrument is introduced in a pleading by the words "*according to the tenor following,*" or "*of the tenor following,*" or, "*in the words and figures following,*" or, "*the words and matters following,*" or, in fact, any other words which imply that a correct recital is intended, (*see ante, p.* 46), the instrument must be set out correctly; *R.* v. *Powell,* 2 *East, P. C.* 976. *See Id.* 961; even though the pleader need not have set out more than the substance of the instrument in the particular case. A mere literal variance, however, (that is, where the omission or addition of a letter does not alter or change a word, so as to make it another word, *R.* v. *Drake,* 2 *Salk.* 661, will not be material; as, for instance,

"receivd" for "received," *R.* v. *Hart*, *Leach*, 145; 2 *East*, *P. C.* 977, "undertood," for "understood," *R.* v. *Beach*, *Cowp.* 229, "Messes." for "Messrs," *R.* v. *Oldfield*, 1 *Russ.* 360, or the like. On the other hand, if the matter of a written instrument be introduced by words which imply that the substance only, and not the very words of the instrument, is set out, as, for instance, by the words "in substance as follows," *Wright* v. *Clement*, 3 *B.* & *Ald.* 503, or "to the effect following," *R.* v. *Bear*, 2 *Salk.* 417, or, "in manner and form following," *R.* v. *May*, 1 *Doug.* 193; 1 *Leach*, 227, or the like, if the instrument produced in evidence be in substance the same with that set out, it will be sufficient. *See the authorities collected*, *Stark. Crim. Pl.*, tit. *Variance.*

An important alteration has been made in the law upon the subject of variances by stat. 9 *G.* 4, *c.* 15, by which judges at *Nisi Prius*, and courts of oyer and terminer and general gaol delivery, are empowered to amend the record upon which any trial may be pending, in any indictment or information for any *misdemeanor*, where any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record. In the construction of this statute, it has been holden to apply to those cases only in which a written instrument is professed to be set out, *Ryder* v. *Malbon*, 3 *C.* & *P.* 594, and then only to mere verbal alterations, and not to omissions which alter the effect of the part set out. *Rutherford* v. *Evans*, 4 *C.* & *P.* 79. So, an amendment has been refused where no variance would have occurred had common care been used in setting forth the instrument. *Jelf* v. *Oriel*, 4 *C.* & *P.* 22. Where the date of a bill of exchange was misdescribed, the declaration has been amended, *Bentzing* v. *Scott*, 4 *C.* & *P.* 24; and where a judgment was stated upon the record to be of one court, and appeared, when produced, to be of another court, Lord *Tenterden* allowed the record to be amended; *Briant* v. *Eicke*, *Moo.* & *M.* 357. Where, in an indictment for perjury, an affidavit was described as being sworn and entitled in a cause of the *commissioners* of charitable donations and bequests in Ireland against J. S., but the affidavit was in fact entitled "the commissioner," (in the singular number), an amendment was allowed. *Reg.* v. *Christian*, *C.* & *Mar.* 388. *See also Reg.* v. *Newton*, 1 *C.* & *K.* 469. But where, in an action for a malicious prosecution, the declaration stated that the former suit was terminated by judgment of *non pros.*, and it appeared that it had been discontinued upon payment of costs, it was holden that the record could not be amended, because it was not the mis-statement of a written instrument, but the statement of the judgment of a court, of which there was no evidence. *Webb* v. *Hill*, 3 *C.* & *P.* 485. And it has been said, that amendments ought to be made under the statute very sparingly in criminal cases. *R.* v. *Cooke*, 7 *C.* & *P.* 559: *Reg.* v. *Hewins*, 9 *C.* & *P.* 786.

If a written instrument be described in pleading as *purporting to* be so and so, the instrument, when produced in evidence, must appear, upon the face of it, to be what it is described in the pleading as purporting to be, otherwise the variance will be fatal, and may be taken advantage of at the trial; or, (if the instrument be also set out *verbatim* in the pleading), the opposite party may demur, or bring a writ of error. As, for instance, where the instrument was described in an indictment as "a certain paper writing purporting to be a bank note," and the note produced, though made to resemble, varied materially in its form from a real bank note, the defendant was acquitted.

*R.* v. *Jones*, 1 *Doug.* 300. So, where a bill of exchange was described in an indictment as "purporting to be directed to one J. King, by the name and description of J. Ring," the judgment was arrested; for, if it were really directed to J. Ring, it could not purport (that is, appear upon the face of it) to be directed to J. King. *R.* v. *Reading*, 1 *East*, 180, *n.*; 2 *Leach*, 590. *See R.* v. *Gilchrist*, 2 *Leach*, 697: *R.* v. *Edsall*, *Id.* 662.

Where words are the gist of the offence, and consequently set out in the indictment, they must be proved strictly as laid; if there be any material variance between the words proved and those laid,—even if laid as spoken in the third person, and proved to have been spoken in the second, *R.* v. *Berry*, 4 *T. R.* 217, or laid as spoken affirmatively, and proved to have been spoken by way of interrogation, *Barnes* v. *Holloway*, 8 *T. R.* 150, or the like—the defendant must be acquitted. But if some of the words be proved as laid, and the words so proved be sufficient to constitute the offence for which the defendant is indicted, failing to prove the remainder of the words will not be material. The rule is the same as in civil actions for defamation. *See Campsgrove* v. *Martin*, 2 *W. Bl.* 790: *Walters* v. *Mace*, 2 *B. & Ald.* 756: *Hancock* v. *Winter*, 7 *Taunt.* 205. Where words are laid as an overt act of treason, it is sufficient to prove that the words really used were the same in substance as those laid, for the reason mentioned *ante*, *p.* 47.

It has already been observed, that the intention of the party at the time he commits an offence is often an essential ingredient in it; and, in such case, it is as necessary to be proved as any other fact or circumstance laid in the indictment. Where an indictment alleged that the defendant cut the prosecutor, with intent to murder, to disable, and to do some grievous bodily harm, it was holden not to be supported by proof of an intention to prevent a lawful apprehension, *R.* v. *Duffin*, *R. & R.* 365: *R.* v. *Boyce*, 1 *Mood. C. C.* 29, unless for the purpose of effecting his escape, he also harboured the intent stated in the indictment. *R.* v. *Gillow*, 1 *Mood. C. C.* 85. The intention, however, is not capable of positive proof; it can only be implied from overt acts; and every man is supposed to intend the necessary consequence of his own acts. *R.* v. *Farrington*, *R. & R.* 207. Therefore, if it cannot be implied from the facts and circumstances which, together with it, constitute the offence, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial. *See* 6 *East*, 464. Thus, on an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that at some other time the prisoner intentionally shot at the same person. *R.* v. *Voke*, *R. & R.* 531. So, upon an indictment for procuring base coin with intent to utter it, evidence of the defendant having a large quantity of such coin is admissible to prove the intent. *R* v. *Fuller*, *R. & R.* 308. And on an indictment for sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be given in evidence, as explanatory of the meaning and intent of the particular letter upon which the indictment is framed, *R.* v. *Robinson*, 2 *Leach*, 749, if the intent cannot be inferred from the letter itself. *R.* v. *Boucher*, 4 *C. & P.* 562. Where a man was charged with publishing a libel against magistrates, with intent to defame those magistrates, *and also* with intent to bring the administration of justice into contempt, *Bayley*, J., held, that proof of his having published it with either of these intentions would

support the indictment. *R.* v. *Evans*, 3 *Stark*. 35. And where an indictment charged the defendant with having assaulted a female child with intent to abuse *and* carnally know her, and the jury negatived the intention carnally to know her, but found that the defendant intended to abuse her, *Holroyd*, J., held that the averment was divisible, and that the defendant might be convicted of an assault with intent to abuse merely. *R.* v. *Dawson*, 2 *Stark. N. P.* 62. There are some cases in which the intent is inferred as a necessary conclusion from the act done; as, if a man knowingly utter a forged instrument as a genuine one, the intent to defraud the party to whom he utters it is a necessary inference. *Reg.* v. *Hill*, 2 *Mood. C. C.* 30; 8 *C. & P.* 274: *Reg.* v. *Cooke*, *Id.* 582.

If a man be charged with an offence as principal in the first degree, evidence of his being principal in the second degree will support the indictment, and *e converso;* as, for instance, if A. and B. be indicted for murder, and the indictment charge that A. gave the mortal stroke, and that B. was present, aiding and abetting, evidence that B. gave the mortal stroke, and that A. was present, aiding and abetting, will support the indictment. *Fost.* 351; *R.* v. *Mackally*, 9 *Co.* 67 *b; Plowd.* 98: *Reg.* v. *Crisham*, *C. & Mar.* 187. Also, in conspiracies, and even in high treason, when it consists of a conspiracy, and in all other offences which involve a conspiracy, not only the acts of the defendant himself, but also all the acts of his accomplices, done in furtherance of the common object, no matter where committed, may be given in evidence against him. *R.* v. *Hardy*, 1 *East*, *P. C.* 98, 99: *R.* v. *Tooke*, *Id.* 98. As a foundation for such evidence, however, the existence of the conspiracy must be first proved; *2ndly*, evidence must be given to connect the defendant with the conspirators; and *3rdly*, it must be proved that the person whose acts are about to be given in evidence was connected with the defendant in the same conspiracy. The prosecutor may, however, either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different parties, and so prove the conspiracy. *R. v. Lovat*, 9 *St. Tr.* *670, *&c. See also R.* v. *Stone*, 6 *Tr.* 528: *R.* v. *Standley*, *R. & R.* 305: *R.* v. *Gogerly*, *Id.* 343: *R.* v. *Bingley*, *Id.* 446: *Reg.* v. *Frost*, 9 *C. & P.* 149: *Reg.* v. *Shellard*, *Id.* 277.

In indictments upon statutes, we have seen, (*ante*, *p.* 52), that where an exception or proviso is mixed up with the description of the offence, in the same clause of the statute, the indictment must shew, negatively, that the party, or the matter pleaded, does not come within the meaning of such exception or proviso. The negative averments seem formerly to have been proved in all cases by the prosecutor; but the correct rule upon the subject appears to be, that, in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defence; but, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative. Thus, informations upon the game laws must negative the defendant's qualification to kill game; but this negative need not be proved upon the part of the prosecution; on the contrary, the defendant must prove the affirmative of it, as matter of defence. *R.* v. *Turner*,

5 *M. & Selw.* 205. So, informations for selling ale without a license must negative the existence of a license; but the informer need not prove the negative. *R.* v. *Hanson, Paley, by Dowling,* 45, *n. See* 1 *Hawk. c.* 89, *s.* 17: *Apothecaries' Co.* v. *Bentley,* 1 *C. & P.* 538; *Ry. & M. N. P.* 159. On the other hand, upon an indictment on the repealed stat. 43 *G.* 3, *c.* 107, *s.* 1, which made it felony to course deer in an inclosed ground, without the consent of the owner—that the deer were coursed *without the consent* of the owner, was held necessary to be proved on the part of the prosecution. *R.* v. *Rogers,* 2 *Camp.* 654. But although it was once supposed that the negative, in such cases, could only be proved by the owner, it is now fully established that it may be presumed from circumstances, or be proved by the agent of the owner. *R.* v. *Allen, R.* v. *Argent, R.* v. *Chamberlain,* 1 *Mood. C. C.* 156: *R.* v. *Hazy,* 2 *C. & F.* 458.

It is not necessary to prove the offence charged in the indictment to the whole extent laid, provided the facts proved constitute an offence punishable by law, *R.* v. *Hollingberry,* 4 *B. & C.* 330; *R.* v. *Hunt,* 2 *Camp.* 515, of the same quality as that charged: for an indictment for a felony will not support a conviction for a misdemeanor. *R.* v. *Westbear,* 2 *Str.* 1133; 1 *Leach,* 12. Thus, where a statute annexes a higher degree of punishment to a common-law felony, if committed under certain circumstances, if, upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only. So, if a misdemeanor at common law be made additionally penal by statute, if committed under certain circumstances, the defendant shall be convicted only of the misdemeanor at common law, if the prosecutor succeed in proving the commission of the offence, but fail in proving that it was committed under the circumstances specified in the statute. 2 *Hale,* 191, 192. Upon an indictment for murder, if the prosecutor fail in proving the malice prepense, the defendant may be convicted of manslaughter; *R.* v. *Mackally,* 9 *Co.* 676; or, on a charge of burglary, and stealing goods, if no burglary be proved; or of robbery, if the property be not taken from the person by violence or putting in fear, the prisoner may be convicted of the simple larceny. 2 *Hale,* 203. And it is now provided by the stat. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, that, on the trial of an indictment for any felony which includes an *assault,* the party may be convicted of the assault only, if the evidence prove no more. Where the defendant was indicted for stealing a colt, it was holden, that he could not be convicted under the stat. 1 *Edw.* 6, *c.* 12, *s.* 10, which did not mention colts, but might be convicted of the simple larceny. *R.* v. *Beaney, R. & R.* 416. Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. *See R.* v. *Rhodes,* 2 *Ld. Raym.* 886. Upon an indictment for high treason, proof of any one overt act is sufficient, provided the overt act so proved be a sufficient overt act of the treason laid in the indictment. 1 *Hale,* 122; *Fost.* 194; 2 *Hawk. c.* 46, *s.* 35. Upon an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy to prevent one workman from working. *R.* v. *Bykerdyke,* 1 *M. & Rob.* 179. Where an indictment contains divisible averments, as, that the defendant "forged and caused to be forged," proof of either averment will be sufficient. *R.* v. *Middlehurst,* 1 *Burr.* 400. Thus, a defendant may be convicted of printing

and publishing a libel, upon an indictment which charges him with composing, printing, and publishing it. *R.* v. *Hunt*, 2 *Camp.* 585: *R.* v. *Williams*, *Id.* 646. And where two intentions are ascribed to one act, as that a libel was published with intent to defame A. B., and also to bring the administration of justice into contempt, *R.* v. *Evans*, 3 *Stark.* 35, or that an assault was committed upon a female, with intent to abuse and carnally know her, *R.* v. *Dawson*, *Id.* 62, proof of either of these intentions will be sufficient. So, where an indictment charged that the defendant was employed in two branches of the post-office, (7 *G.* 3, *c.* 50, *s.* 1), proof of his employment in either was holden sufficient. *R.* v. *Ellins*, *R.* & *R.* 188. And where an information for a libel charged that outrages had been committed in and near the neighbourhood of Nottingham, it was held that the averment was divisible, and that it was sufficient to prove that outrages had been committed in either place. *R.* v. *Sutton*, 4 *M.* & *Selw.* 532. In larceny, if any one of the articles enumerated in the indictment be proved to have been stolen by the defendant, it will be sufficient. 2 *Hale*, 302: *see R.* v. *Ellins*, *R.* & *R.* 188. Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. *R.* v. *Burdett*, 1 *Ld. Raym.* 149. *See R.* v. *Carson*, *R.* & *R.* 303. And upon an indictment for obtaining money by false pretences, proof of part of the pretence alleged, if the money were obtained upon that part, will be sufficient. *R.* v. *Hill*, *R.* & *R.* 190. Upon an indictment against two for a joint and single offence, as stealing in the dwelling-house, either may be found guilty; but they cannot be found guilty of separate parts of the charge; and if found guilty separately, a pardon must be obtained, or a *nolle prosequi* entered as to the one who stands second upon the indictment, before judgment can be given against the other. *R.* v. *Hemstead*, *R.* & *R.* 344. But where several are indicted for burglary and larceny, one may be found guilty of the burglary and larceny, and the others of the larceny only. *R.* v. *Butterworth*, *R.* & *R.* 520.

Allegations which are not essential to constitute the offence, and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof, and may be rejected as surplusage. *R.* v. *Jones*, 2 *B.* & *Ad.* 611. As, for instance, where a defendant was charged in the indictment with having committed arson in the night-time, and it was proved that he committed it in the day-time, he was convicted, and the conviction was holden good. *R.* v. *Minton*, 2 *East*, *P. C.* 1021. So, if a man be indicted for robbery near the highway, *R.* v. *Summers*, 2 *East*, *P. C.* 785: *R.* v. *Wardle*, *Id.*; *R.* & *R.* 9, or in a dwelling-house, *R.* v. *Pye*, *Id.*: *R.* v. *Johnstone*, *Id.* 10, and the prosecutor prove the robbery, but fail in proving it to have been committed near the highway, or in the dwelling-house, the defendant shall nevertheless be convicted; for robbery is the same felony wherever committed. So, if an offence, not of a local nature, be described as having been committed in a certain parish; for the offence is the same wheresoever committed, and the county is the only thing material to give the court jurisdiction. *R.* v. *Woodward*, 1 *Mood. C. C.* 323. So, upon an indictment for having in possession a die made of iron and steel, (upon the repealed stat. 8 & 9 *W.* 3, *c.* 26, *s.* 1), it was holden immaterial of what the die was made, and that proof of a die made of either or both would satisfy the charge. *R.* v. *Oxford*, *R.* & *R.* 382: *R.* v. *Phillips*, *Id.* 369. Upon the same principle, in *R.* v. *Holt*, 5 *T. R.* 446; 2

*Leach*, 593, it was holden, upon an information for a libel, with intent to bring a proclamation of the king into contempt, that an averment that divers addresses had been presented to his Majesty on the occasion of such proclamation, was not connected with the charge, and therefore did not require proof. But this rule does not extend to allegations, necessary or unnecessary, which are descriptive of the *identity* of that which is legally essential to the charge. As, for instance, an indictment for stealing a *black* horse, will not be supported by proof that the horse was of some other colour; for the allegation of colour is descriptive of that which is legally essential to the offence, and cannot be rejected. 2 *Stark. Evid.* 1531. So, if a person necessarily named in an indictment be described by a false addition, such addition, though unnecessary, is material, and must proved. *R.* v. *Deeley*, 1 *Mood. C. C.* 303. So, upon an indictment (on the repealed stat. 57 *G.* 3, *c.* 90) for being found armed with intent to destroy game in a certain wood, called the Old Walk, in the occupation of J. J., it was holden,—it appearing that the wood had always been called the Long Walk, and never the Old Walk,—that, although it was unnecessary to state the name of the close when the occupation was stated, yet, being stated, it was material, and could not be rejected. *R.* v. *Owen*, 1 *Mood. C. C.* 118. And where an indictment for stealing a bank note described it as signed by A. H., for the Governor and Company of the Bank of England, it was holden by the judges that there could be no conviction without evidence of the signature of A. H. *R.* v. *Craven*, *R.* & *R.* 14.

*Matter of Defence, &c.*]—Matter of defence, when given in evidence under the general issue, (and which is almost invariably the case, *see ante, p.* 93), is proved by parol evidence, or by records or other written evidence, according to the rules laid down in the next chapter; when pleaded, and put in issue by the replication, it is also proved in the same manner, but subject to the same rules as to variance that have just now been laid down with respect to indictments. And the same as to matter of replication, &c.

*Matter not alleged, in what cases.*]—The general rule upon this subject, in criminal as well as civil cases, is, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. Thus, it is not allowable, upon the trial of an indictment, to shew that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Upon an indictment for an infamous crime, an admission by the defendant that he had committed such an offence at another time with another person, and had a tendency to such practices, ought not to be received. *R.* v. *Cole*, 1 *Phil. Ev.* 170. In fact, there is no exception to this rule in criminal cases, although there are certainly some cases which seem to be so. In high treason, by stat. 7 & 8 *W.* 3, *c.* 3, *s.* 8, no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment; yet this does not prevent overt acts, not laid, from being given in evidence, if they be direct proof of any of the overt acts which are laid; *R.* v. *Rookwood*, 4 *St. Tr.* 661, 697; *Holt*, 683, 615: *and see* 4 *St. Tr.* 722, 731; 6 *St. Tr.* 282, 284; *Fost.* 9, 22; *R.* v. *Watson*, 2 *Stark. N. P.* 134; and if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act, though done in a foreign county,

may be given in evidence. *Fost.* 9, 22; 8 *St. Tr.* 218; 9 *St. Tr.* 580, 558—562; 4 *St. Tr.* 627, 655; 6 *St. Tr.* 292; 8 *Mod.* 91. Or, if the treason consist of a conspiracy, any act of the defendant's accomplices, done in furtherance of the common design, although not laid as an overt act in the indictment, may be given in evidence, provided it be direct proof of an overt act laid. *R.* v. *Hardy*, 1 *East*, *P. C.* 98, 99. So, in ordinary cases of conspiracy, acts done by some of the conspirators in the county in which the offence is laid being proved, acts done by others of the conspirators in other counties may be given in evidence. *R.* v. *Bowes*, 4 *East*, 171, *n.* And in an indictment against persons for a conspiracy to carry on the business of common cheats, evidence was admitted of the defendants having made false representations to other tradesmen besides those named in the indictment. *R.* v. *Roberts*, 1 *Camp.* 400. In *R.* v. *Hunt and others*, 3 *B. & Ald.* 566, upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his Majesty's subjects at Manchester, it was holden that the previous conduct of a portion of the assembly, in training, &c., and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it, as to each particular defendant, was a distinct matter for the consideration of the jury. It was holden, also, that it was competent to shew, as against Hunt, (who, though a stranger, except by political connexion, had been invited to preside as chairman at the meeting), that at a similar meeting in another place, holden for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declaration of his sentiments and views on the particular subject of such meetings, and of the topics there discussed. But the court held, that evidence of the misconduct of the military and others, in the subsequent dispersion of the meeting, was properly refused by the judge at the trial, as irrelevant and having no bearing upon the intention and objects of the meeting, which intention and objects obviously existed previously to the alleged misconduct of the military attempted to be given in evidence. With a view to prove the identity of the defendant, it may be shewn that other goods not included in the indictment, which were stolen from the premises at the same time, were found in his possession. So, it may be shewn, upon an indictment for arson, that property taken out of the house at the time of the firing was afterwards found secreted in the possession of the prisoner. *R.* v. *Rickman*, 2 *East*, *P. C.* 1035. And where several felonies are connected together, and form one entire transaction, upon an indictment for one, the other may be proved, to shew the character of the transaction; *R.* v. *Ellis*, 6 *B. & C.* 145: *R.* v. *Egerton*, *R. & R.* 375: *R.* v. *Rooney*, 7 *C. & P.* 517: *Reg.* v. *Mansfield*, *C. & Mar.* 140; although, if the felonies be distinct, such evidence is inadmissible. *R.* v. *Birdseye*, 4 *C. & P.* 386.

Where a guilty knowledge on the part of the defendant is to be proved, the prosecutor is allowed to give in evidence other instances of his having committed the same offence for which he is now indicted. As, for instance, upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, the prosecutor may give evidence (*see R.* v. *Milliard*, *R. & R.* 245) of other forged notes having been uttered by the prisoner at other times, before or after the commission of the offence for which he is

indicted; *R.* v. *Wylie*, 1 *N. R.* 93; 2 *Leach*, 983: *R.* v. *Tattersal*, 1 *N. R.* 93: *R.* v. *Ball*, *R. & R.* 132; 1 *Camp.* 324; or that he had other forged notes of the same kind in his possession: *R.* v. *Hough*, *R. & R.* 120; or, as it would seem, of a different kind, *Bayl. on Bills*, 450, in order to prove, or at least to raise a presumption of, his knowledge that the note in question was forged. So, upon an indictment for uttering counterfeit money, it is competent to the prosecutor to prove that other pieces of such counterfeit money were found upon the defendant, or were uttered by him at different times. 1 *N. R.* 95. For the same reason, proof of the defendant's conduct in such other utterings, as, for example, that he passed by different names, is admissible. *Bayl. on Bills*, 449. Upon an indictment for receiving stolen goods, evidence may be given of the receipt of several articles at different times, for the purpose of shewinga guilty knowledge. *R.* v. *Dunn*, 1 *Mood. C. C.* 148.

And nearly the same rule applies, where it is requisite for the prosecutor to prove malice on the part of the defendant. As, for instance, upon an indictment for murder, former attempts of the defendant to assassinate the deceased would not only be receivable in evidence, but would be very strong presumptive proof of malice prepense. *See R.* v. *Voke*, *R & R.* 531, (*ante, p.* 104). So, for the same reason, former menaces of the defendant, or expressions of vindictive feeling towards the deceased, or, in fact, the existence of any motive likely to instigate him to the commission of the offence in question, are also in such a case receivable in evidence. In a civil action for defamation, the plaintiff is always allowed, in order to prove the malice of the defendant, to give in evidence other words spoken by the defendant, besides those set out in the declaration; *Warne* v. *Chadwell*, 2 *Stark.* 457; *Rustel* v. *Macquister*, 1 *Camp.* 49; and the same in actions for libel. *Lee* v. *Huson*, *Peake, N. P.* 74, 166: *Chubb* v. *Westley*, 6 *C. & P.* 436.

Upon an indictment for a rape, the defendant may give general evidence of the woman's character for want of chastity, or he may prove that she had before been criminally connected with him; *R.* v. *Aspinall*, 2 *Stark. Evid.* 700: *R.* v. *Martin*, 6 *C. & P.* 562: but not that she had been criminally connected with others; *R.* v. *Hodgson*, *R. & R.* 211; *sed quære, see R.* v. *Martin, supra;* and the same upon an indictment with intent to commit a rape. *R.* v. *Clarke*, 1 *Stark.* 243. *See R.* v. *Barker*, 3 *C. & P.* 589. Upon an indictment for libel, the defendant has been allowed to give in evidence such other parts of the same publication as were fairly connected with the libel in question, and upon the same topic, in order to disprove the motive imputed to him by the indictment, and to shew the fair construction that should be put upon the passages therein set out. *R.* v. *Lambert and Perry*, 2 *Camp.* 398. And, in *Horne Tooke's case*, 1 *East*, *P. C.* 31, it being proved on the part of the prosecution that the defendant had distributed several publications advocating republican principles, which was offered in evidence in order to induce a presumption that parliamentary reform (which was expected to be set up by the prisoner in his defence) was a mere pretext to cover his treasonable purposes, the defendant, in order to rebut that presumption, was allowed to give in evidence a book upon parliamentary reform, written by him, and published twelve years before.

The prisoner also will be allowed to call witnesses to speak gene-

rally as to his character, but not to give evidence of particular acts, unless such evidence tend directly to the disproof of some of the facts put in issue by the pleadings.

These several cases now mentioned, when carefully considered, will be found to be, not exceptions to, but rather illustrations of, the rule above mentioned, namely, that nothing shall be given in evidence which does not tend directly to the proof or disproof of the matter in issue. In most of them, the evidence admitted tended directly to the proof of the knowledge or intention of the defendant at the time of the commission of the offence, and which was a material ingredient in the crime imputed to him. In the case of rape above mentioned, the evidence tended to shew the great improbability of any resistance upon the part of the woman, and also that the woman was not entitled to credit as a witness. As to evidence of the defendant's character, it can be of avail only in doubtful cases: where the probabilities of the defendant's guilt on the one side, and the probabilities of his innocence on the other, are nearly equal, satisfactory testimony as to his general good character for honesty or humanity may have the effect of raising a well-founded presumption in the minds of the jurors, that a man of such character could not have been the perpetrator of the larceny or violence imputed to him; and in this sense it may be deemed evidence tending to the disproof of the matter in issue.

Where the offence is stated in general terms in the indictment, as, for instance, where the defendant is indicted as a common barretor or common scold, or for keeping a common gambling-house, or bawdy-house, (*see ante, p.* 42), the prosecutor is allowed of course to give evidence of all the particular facts which constitute the offence thus generally stated in the indictment.

# CHAPTER II.

## THE MANNER OF PROVING THE MATTERS PUT IN ISSUE.

EVIDENCE may be classed under three heads; admissions or confessions, presumptions, and proofs. These we shall consider fully in the several sections of this chapter. But before we enter into a particular consideration of the subject, it may be necessary first to notice one or two rules relating to evidence generally.

*First*, it is a general rule, that the best evidence the nature of the case will admit of must be produced, if it be possible to be had; but if not possible, then the next best evidence that can be had shall be allowed. For if it appear that there is any better evidence existing than that which is produced, the very non-production of it creates a presumption that, if produced, it would have detected some falsehood which at present is concealed, 3 *Bl. Com.* 368; *Gilb. Ev.* 16; *R.* v. *James*, 1 *Show.* 397; *Carth.* 220; *Holt*, 284; 1 *Salk.* 281: *Williams* v. *E. I. Company*, 3 *East*, 192. Therefore, before secondary evidence is offered, a foundation for it must first be laid, by proving that better evidence cannot be obtained. Thus, for instance, the best evidence of the contents of a deed or other written instrument is the written instrument itself; secondary evidence, a copy, or parol evidence of the contents of the original. Therefore, before a copy of a written instrument, or parol evidence of its contents, can be received as proof, the absence of the original instrument must be accounted for, by proving that it is lost or destroyed, or that it is in the possession of the opposite party. The declarations of the opposite party, however, are always receivable in evidence against him, although they relate to the contents of a deed or other written instrument, and even though its contents be directly in issue in the suit. *Slatterie* v. *Pooley*, 6 *M. & W.* 664: *Howard* v. *Smith*, 3 *Scott's N. R.* 574.

Records, however, are apparently an exception to this rule, for they are proved by exemplifications or other copies, in all cases, unless they be records of the court in which they are to be produced, and the matter of record form the gist of the pleading to be proved. *See* 1 *Camp.* 469; 2 *Camp.* 399; 1 *C. & P.* 578. This exception has been adopted from necessity; to require the record itself to be given in evidence would be productive of great inconvenience, for it probably might be wanted for that purpose in several parts of the kingdom at the same time; besides, by removing it from the place in which it was deposited, there would necessarily be great danger of its being lost. *Gilb. Ev.* 7, 8. For the same reasons, journals of the House of Lords or House of Commons,—a bill, answer, depositions, and decree in equity, in most cases,—libel, answer, depositions, &c., in the ecclesiastical and admiralty courts, in most cases, —the rolls of a court baron, and other inferior courts—parish registers—entries in corporation books, or the books of public companies, relating to things public and general,—may all be proved by copies.

When the copy of a document, (the document itself not being evidence at common law), is made evidence by act of Parliament, a copy must be produced; the original is not made admissible evidence by implication. *Burdon* v. *Rickett*, 2 *Camp.* 121, *n.*

Where a written instrument is in the hands of the opposite party, it is necessary to serve him or his attorney with a notice to produce it; and if he do not produce it at the trial, in pursuance of the notice, then, upon proving the service of the notice, you will be allowed to give secondary evidence of its contents. The rule in this respect is the same in criminal as in civil cases; *Attorney-General* v. *Le Merchant*, 2 *T. R.* 201; and the notice must be served a reasonable time before the trial. If served during the assizes, two days before the trial, it has been held insufficient to let in secondary evidence. *R.* v. *Ellicombe*, 1 *M. & Rob.* 260: *see Trist* v. *Johnson*, *Id.* 259. But in cases where the nature of the pleading gives sufficient notice to the defendant of the subject of inquiry, so that he may prepare himself to produce the written instrument, if necessary for his defence, a notice to produce it is not required; thus, for instance, it has been holden that, in trover for a bond, the plaintiff may give parol evidence of it, to support the general description of it in the declaration, without having given the defendant previous notice to produce it. *How* v. *Hall*, 14 *East*, 274. So, upon an indictment for stealing a bill of exchange, parol evidence of it was admitted, without a notice to produce it. *R.* v. *Aickles*, 1 *Leach*, 330. So, upon an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, parol evidence of what the defendant, in fact, said, was holden to be sufficient, without giving him notice to produce the paper. *R.* v. *Moore*, 6 *East*, 421. So, where a seditious meeting came to certain resolutions, and the defendant, who was chairman, gave a copy of these resolutions to another person, it was holden that this copy might be given in evidence, without a notice to produce the original. *R.* v. *Hunt*, 3 *B. & Ald.* 566. In the same case it was also holden, that it was not necessary to produce or account for banners bearing certain inscriptions, &c., exhibited at such meeting, but that parol evidence of such matters, by eye-witnesses, was perfectly admissible to shew the general character and intention of the assembly.

*Secondly*, it is a general rule, that hearsay is no evidence; and for two reasons: what the other person said was not upon oath; and the party who is to be affected by it had no opportunity of cross-examining him. *Gilb. Ev.* 149. To this rule, however, there are some exceptions, arising from necessity:—1. Hearsay is admissible to prove the death of a person beyond sea. *Bull. N. P.* 294; *Doe* v. *Griffin*, 15 *East*, 293. 2. Hearsay is good evidence to prove a prescription, *Bull. N. P.* 295, or custom; *Nicholas* v. *Parker*, 14 *East*, 327, *n.*: *Doe* v. *Sisson*, 12 *East*, 62: *see R.* v. *Antrobus*, 2 *Ad. & Ell.* 788: *Pim.* v. *Curell*, 6 *M. & W.* 234; and for this purpose old witnesses are usually called to prove what they heard in their youth from old persons upon the subject. 3. What a witness has been heard to say at another time may be given in evidence, in order to invalidate or confirm the testimony he gives in court. 2 *Hawk.* c. 46, s. 14; *Gilb. Ev.* 150. 4. When hearsay is introduced, not as a medium of proof to establish a distinct fact, but as being part of the transaction in question, it is admissible. *R.* v. *Gordon*, 21 *St. Tr.* 535. So, declarations made by an agent acting at the time within the scope of his authority, are receivable against the

principal. *See Reg.* v. *Hall*, 8 *C. & P.* 358. Upon the same principle, the declarations of a person robbed, or a woman ravished, as to the fact made immediately afterwards, are evidence to confirm them, though the *particulars* of their statement cannot be inquired into. *See R.* v. *Wink*, 6 *C. & P.* 397 : *R.* v. *Brazier*, 1 *East, P. C.* 444 : *Reg.* v. *Megson*, 9 *C. & P.* 420. 5. Upon an indictment for murder, the dying declarations of the deceased are receivable in evidence, if it appear to the satisfaction of the judge (*R.* v. *John*, 1 *East, P. C.* 358, 360 : *R.* v. *Hucks*, 1 *Stark.* 523) that the deceased was conscious of his being in a dying state at the time he made them, *R.* v. *Woodcock*, 1 *Leach*, 502: *R.* v. *Welbourn*, 1 *East, P. C.* 358 : *R.* v. *Christie, Car. Sup.* 202 : *R.* v. *Van Butchell*, 3 *C. & P.* 629, and was sensible of his awful situation ; *R.* v. *Pike*, 3 *C. & P.* 589 : *R.* v. *Crockett*, 4 *C. & P.* 544 : *R.* v. *Hayward*, 6 *C. & P.* 157 : *R.* v. *Spilsbury*, 7 *C. & P.* 187 : *Reg.* v. *Perkins*, 2 *Mood. C. C.* 135 ; 9 *C. & P.* 395 : *Reg.* v. *Howell*, 1 *C. & K.* 689 ; even though he did not actually express any apprehension of danger, 1 *East, P. C.* 385 ; *R.* v. *Dingler*, 2 *Leach*, 561, and his death did not ensue until a considerable time after the declarations were made. *R.* v. *Mosley*, 1 *Mood. C. C.* 97. The dying declarations of a boy ten years old were held admissible. *Reg.* v. *Perkins*, *supra*. Where the party expressed an opinion that she should not recover, and made a declaration at that time ; but afterwards, on the same day, asked a person whether he thought she would "rise again," it was held that this shewed such a hope of recovery as rendered the previous declaration inadmissible. *R.* v. *Fagent*, 7 *C. & P.* 238 ; *see Reg.* v. *Megson*, 9 *C. & P.* 418. But these declarations are only admissible where the death of the deceased is the subject of the charge, and the cause of the death the subject of the dying declaration. *R.* v. *Mead*, 2 *B. & C.* 608—*per Abbott*, C. J. Therefore, upon an indictment for perjury, a dying declaration is not admissible to disprove a fact upon which the perjury is assigned. *R.* v. *Mead*, 4 *D. & R.* 120 ; 2 *B. & C.* 606. And upon an indictment for administering savin to a pregnant woman not quick with child, her dying declarations are not admissible, though they relate to the cause of her death. *R.* v. *Hutchinson*, 2 *B. & C.* 608, *n.* And where a man was robbed, and died before the trial of the person charged with the robbery, *Bolland*, B., refused to receive his dying declarations respecting the robbery, holding that such declarations were evidence only in cases where the death of the party is the subject of the inquiry. *R.* v. *Lloyd*, 4 *C. & P.* 233. But on an indictment for the murder of A. by poison, which was also taken by B., who died in consequence, the dying declarations of B. were held admissible. *R.* v. *Baker*, 2 *M. & Rob.* 53. The dying declarations of an accomplice are holden admissible in evidence, *R.* v. *Tinkler*, 1 *East, P. C.* 354, 356, provided he were at the time such a person as would be competent as a witness. *R.* v. *Drummond*, 1 *East, P. C.* 353 ; 1 *Leach*, 378. Dying declarations *in favour of* the party charged with the death are admissible in evidence, as they may have an influence on the amount of punishment. *R.* v. *Scaife*, 1 *M. & Rob.* 551. Where two such declarations were made, the second of which alone was reduced into writing in the presence of a magistrate, this written declaration not being forthcoming at the trial, the judges held that, in the absence of it, the first declaration was admissible evidence. *R.* v. *Reason*, 1 *Str.* 499. But where a declaration *in articulo mortis* was reduced into writing, and signed by the party, the judge refused to receive either a copy of the paper,

or parol evidence of the declaration. *R.* v. *Gay*, 7 *C. & P.* 230. It is no objection against such a declaration, that it was made in answer to questions put to the deceased, and not a continuous statement made by him. *R.* v. *Fagent, supra.*

Having thus noticed these two general rules, we shall now proceed to consider the remainder of this part of our subject, under the following heads:—



## SECT. 1.

### ADMISSIONS AND CONFESSIONS.

*In what Cases.*]—ADMISSIONS and confessions are of four kinds:—

1. Where the defendant in open court confesses that he is guilty of the offence of which he is charged in the indictment.

2. Where the defendant, upon an indictment for a misdemeanor, yields himself to the Queen's mercy, and desires to submit to a small fine; which submission the court may accept, if they think fit, without putting the defendant to a direct confession. 2 *Hawk. c.* 31, *s.* 3.

3. Where the defendant, upon his examination before justices of the peace, on a charge of felony or misdemeanor, under stat. 7 *G.* 4, *c.* 64, *ss.* 2, 3, admits either his guilt or any fact which may tend to prove it at the trial.

4. Where the defendant makes an admission or confession of his guilt, or of any fact which may tend to the proof of it, to any other person; or assents to what is said in his presence and hearing, relative to a fact within his knowledge.

All these several species of confession, in order to be admissible, must be free and voluntary. And in the case of a confession before a magistrate or other person, if it appear that the defendant was induced to make it by any promise of favour, or by menaces, or undue terror, it shall not be received in evidence against him. 2 *Hale*, 285. Thus, if it be said to the defendant that it will be better or worse for him if he do or do not confess; 2 *East, P. C.* 659; or that what he says will be taken down, and used *for him* or against him on his trial; *Reg.* v. *Drew*, 8 *C. & P.* 140; or even if a confession be procured by a threat to take the defendant before a magistrate, if he do not give a more satisfactory account; *R.* v. *Thompson*, 1 *Leach*, 291; or to send for a constable; *R.* v. *Richards*, 5 *C. & P.* 518: *Reg.* v. *Hearn*, *C. & Mar.* 109; or by saying, "tell me where the things are, and I will be favourable to you;" *R.* v. *Cass. Id.* 290, *n.*; or, "you had better tell all you know;" *R.* v. *Kingston*, 4 *C. & P.* 387; or, "you had better tell where you got the property;" *R.* v. *Dunn*, 4 *C. & P.* 543; or, "you had better split, and not suffer for all of them;" *R.* v. *Thomas*, 6 *C. & P.* 353; or, "it would have been better if you had told at first;" *R.* v. *Walkeley*, 6 *C. & P.* 175; or, "I should be obliged to you if you

would tell us what you know about it; if you will not, of course we can do nothing;" *R.* v. *Partridge*, 7 *C.* & *P.* 551; or, "anything you can say in your defence we shall be ready to hear; *Reg.* v. *Morton*, 2 *M.* & *Rob.* 514;—the confession will not be admissible. Where the prosecutor asked the defendant for the money which he had taken, and, before it was produced, said, "I only want my money, and if you give me that, you may go to the devil if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible. *R.* v. *Jones*, *R.* & *R.* 152: *R.* v. *Barrett*, 4 *C.* & *P.* 570. And a confession, with a view, and under a hope, of being thereby permitted to turn Queen's evidence, or of obtaining a pardon or reward, has been holden inadmissible. *R.* v. *Hall*, 2 *Leach*, 559. *See R.* v. *Bailey*, 2 *Stark. Ev.* 23: *Reg.* v. *Boswell*, *C.* & *Mar.* 584. To exclude a confession made under the influence of a promise or threat, the promise and threat must be of a description which may be presumed to have such an effect on the mind of the defendant as to induce him to confess: and therefore an exhortation, admonition, promise, or threat, proceeding at a prior time from some one who has no concern in the apprehension, prosecution, or examination of the prisoner, but interferes without any authority, will not be sufficient to render a confession inadmissible. *R.* v. *Rowe*, *R.* & *R.* 153: *R.* v. *Hardwick*, 1 *Phil. Ev.* 105: *R.* v. *Gibbons*, 1 *C.* & *P.* 97: *R.* v. *Tyler*, *Id.* 129: *R.* v. *Clewes*, 4 *C.* & *P.* 221. It seems that there has been a difference of opinion among the judges on this point,—whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable or not. In a recent case, however, it was stated that it is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and that if a person not in any office or authority hold out to the accused party an inducement to confess this will not exclude a confession made to that party. *Reg.* v. *Sarah Taylor*, 8 *C.* & *P.* 733. But where such a person held out an inducement in the presence of the prosecutor's wife, who expressed no dissent, the confession was held not to be receivable. *Id.*; *R.* v. *Spencer*, 7 *C.* & *P.* 776: *see Reg.* v. *Hewett*, *C.* & *Mar.* 534. Where the prisoner was taken by the constable to an inn, and the innkeeper, in the constable's hearing, held out an inducement to him to confess, and the prisoner, in the constable's hearing, made a confession to the innkeeper, which the constable was called to prove, *Alderson*, B., thought the evidence inadmissible. *R.* v. *Pountney*, 7 *C.* & *P.* 302. And see *R.* v. *Dunn*, 4 *C.* & *P.* 543: *R.* v. *Slaughter*, *Id.* 554, *n.* Where a girl, being apprehended for the murder of her child, was left by the constable in custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her and the man would go free, upon which she made a confession, *Parke*, J., and *Taunton*, J., held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. *R.* v. *Enoch*, 5 *C.* & *P.* 535. And confessions obtained from a servant through hopes and threats held out by the wife, or by the relations and neighbours, of her master and prosecutor, have been held inadmissible by all the judges: *R.* v. *Simpson*, 1 *Mood. C. C.* 410: *R.* v. *Upchurch*, *Id.* 465. The inducement must refer to a temporal benefit; for hopes which are referrible to a future state merely, are not within the principle which excludes confessions obtained by improper influence. *R.* v. *Gilham*, *R.* & *M.* 186.

So, where a prisoner under fourteen years of age, charged with murder, was told by a man who was present when he was apprehended, "Now kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty," and the prisoner, in consequence, made a statement, this was held (strictly) admissible. *R.* v. *Wild*, 1 *Mood. C. C.* 452. But where a constable, after having asked the prisoner what he had done with the stolen property, said, "you had better not add a lie to the crime of theft," *Gaselee*, J., refused to receive a statement thereupon made by the prisoner in evidence. *R.* v. *Shepherd*, 7 *C. & P.* 579. The only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an *untrue* one; if not, it will be admissible. Thus, where a prisoner asked of a witness with whom he was in conversation, whether he had better confess, and the witness replied that he had better not confess, but he might say what he had to say to him, for it should go no further, a statement thereupon made by the prisoner was held admissible. *R.* v. *Thomas*, 7 *C. & P.* 345. So, where, a prisoner being taken before a magistrate on a charge of forgery, the prosecutor said, in the hearing of the prisoner, that he considered him the tool of G., and the magistrate then told the prisoner to be sure to tell the truth, and upon this the prisoner made a statement, this was held receivable. *R.* v. *Court*, 7 *C. & P.* 496. So, also, where the magistrate, after the examination of the witnesses, said to the prisoner, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial." *Reg.* v. *Holmes*, 1 *C. & K.* 248. Where a prisoner is willing to make a statement, it is the magistrate's duty to receive it, but he ought, before doing so, entirely to get rid of any impression that may have been on the prisoner's mind, that the statement may be used for his own benefit; and he ought also to be told, that what he thinks fit to say will be taken down, and may be used against him on his trial. *See Reg.* v. *Arnold*, 8 *C. & P.* 621. A statement made by a prisoner when he is drunk is admissible, even though, as it seems, the liquor was given to him in the hope that he would make some admissions. *R.* v. *Spilsbury*, 7 *C. & P.* 187.

It is no objection to the admissibility of a confession, that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though it were created by artifice, with a view to obtain the confession. *R.* v. *Bailey*, 1 *Phil. Ev.* 104. And a letter given by a defendant to the gaoler to put into the post is evidence against him. *R.* v. *Derrington*, 2 *C. & P.* 418. If the promise or menace, &c. take place previously to the prisoner's being brought before the magistrate, the court will, in general, refuse to admit the confession to be given in evidence, unless it appear that the prisoner was undeceived by the magistrate, and cautioned by him not to expect the favour, or not to regard the menaces held out to him. 2 *East, P. C.* 658; *and see R.* v. *Lingate*, 1 *Phil. Ev.* 165: *Reg.* v. *Arnold*, *supra*. But where a defendant, having been told by a constable that he might do himself some good by confessing, afterwards asked the magistrate if it would benefit him to confess, and the magistrate saying he could not say it would, the defendant then declined to confess, but afterwards, when going to prison, made a confession to the constable, the judges held the confession to be admissible, because the answer of the magistrate was sufficient to remove any expectation which the constable might have caused. *R.* v. *Rosier*, 1 *Phil. Ev.* 105. *See R.* v. *Green*, 5 *C. & P.*

312: *R.* v. *Clewes*, 4 *C. & P.* 221: *R.* v. *Richards*, 5 *C. & P.* 318: *R.* v. *Howes*, 6 *C. & P.* 404: *Reg.* v. *Dingley*, 1 *C. & K.* 637. If a confession be obtained by undue means, any statement made under the influence of that impression cannot be received. 2 *East, P. C.* 658; *R.* v. *White*, 1 *Phil. Ev.* 104: *R.* v. *Nute, MS. Burn's Just., Confession.* The only questions in these cases really are: was any promise of favour, or any menace or undue terror made use of to induce the prisoner to confess? and if so, was the prisoner induced by such promise or menace, &c., to make the confession attempted to be given in evidence? If the judge be of opinion in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appear to him, from the circumstances, that, although such promises or menaces were held out, they did not operate upon the mind of the prisoner, but that his confession was voluntary notwithstanding, and he was not biassed by such impression in making it, the judge will admit the evidence.

Examinations upon oath are not admissible; 1 *Hale*, 585; and where an examination in writing purported to have been taken upon oath, *Le Blanc*, J., refused to admit parol evidence to shew that, at the time of his examination, the defendant was not sworn. *R.* v. *Smith*, 1 *Stark.* 242: *see also R.* v. *Rivers*, 7 *C. & P.* 177: *Reg.* v. *Pikesley*, 9 *C. & P.* 124. In a recent case, where the prisoner was sworn by mistake, but, as soon as the mistake was discovered, the deposition was destroyed, his subsequent statement was received in evidence. *R.* v. *Webb*, 4 *C. & P.* 564. And where a statement made by the prisoner upon oath, at a time when he was not under suspicion, was tendered in evidence, *Vaughan*, B., received it. *R.* v. *Tubby*, 5 *C. & P.* 530. In a more recent case, however, where the prisoner and others were examined upon oath, no specific charge being at the time made against any person, but, in the result, the prisoner was committed for the offence, *Gurney*, B., refused to receive in evidence what the prisoner had stated upon that occasion. *R.* v. *Lewis*, 6 *C. & P.* 161. How far statements made by a prisoner upon oath, on a coroner's inquest relating to the same transaction, are admissible, appears to be involved in some doubt. In one case, *Alderson*, B., refused to receive in evidence, on an indictment for murder, a statement made by the prisoner before the coroner, which was taken down in writing, and purported to be taken on oath, and would not allow evidence to be given to shew that in fact it was not taken on oath. *Reg.* v. *Wheeley*, 8 *C. & P.* 251. In a subsequent case, on an indictment for rape, statements voluntarily made upon oath, at the inquest held on the party alleged to have been ravished, were received in evidence; *Reg.* v. *Owen*, 9 *C. & P.* 83; but afterwards, on the trial of the same prisoners for the murder of the same person, the same depositions were rejected. *Reg.* v. *Owen*, 9 *C. & P.* 238. On the other hand, in *R.* v. *Howarth, Greenw. Coll. Stat.* 137, *Parke*, B., received in evidence, on an indictment for murder, a deposition made by the prisoner on oath as a witness before the coroner; and in *Reg.* v. *Sandys, C. & Mar.* 347, *Erskine*, J., received similar evidence, and reserved the point, but the prisoner was acquitted: and this would seem to be the better opinion. It is no objection to the admissibility of a confession that it was elicited by questions, if no undue influence be used; *R.* v. *Ellis, Ry. & M. N. P.* 432: *R.* v. *Thornton*, 1 *Mood. C. C.* 27; and declarations of a defendant, though made as a witness before a committee of the House of Commons, and under com-

pulsory process, were holden by *Abbott*, C. J., in *R.* v. *Merceron*, 2 *Stark.* 366, to be admissible against the defendant upon an indictment for corruptly granting licenses to public-houses. *See R.* v. *Gilham*, 1 *Mood. C. C.* 203. So, the examination of a person taken on oath before commissioners of bankruptcy, he having been cautioned, and allowed to elect what questions he would answer, was held admissible against him on a charge of forgery. *Reg.* v. *Wheater*, 2 *Mood. C. C.* 45. So, the answer of the defendant in a suit in equity, instituted against him by the prosecutor, is admissible on an indictment against him. *Reg.* v. *Goldshede*, 1 *C. & K.* 657. But on an indictment against a bankrupt for concealing his effects, where it was proposed to prove the petitioning creditor's debt by putting in the bankrupt's balance sheet, delivered in upon oath, *Alderson*, B., and *Patteson*, J., held it was not receivable for that purpose. *Reg.* v. *Britton*, 1 *M. & Rob.* 297.

Although a confession, for the above or any other reasons, may not be receivable in evidence, yet any discovery that takes place in consequence of such confession, or any act done by the defendant, if it be confirmed by the finding of the property, *R.* v. *Jenkins*, *R. & R.* 492, will be admitted; as, for instance, if a man, by promise of favour, be induced to confess that he knowingly received certain stolen goods, and that they are in such a room in his house, and the goods be found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved, that in consequence of something the witness heard from the defendant, he found the goods in question in the defendant's house. *R.* v. *Lockhart*, 2 *East, P. C.* 658; 1 *Leach*, 386: *and see R.* v. *Warwickshall*, 1 *Leach*, 263: *R.* v. *Mosey*, *Id.* 265, *n.*: *R.* v. *Butcher*, *Ib.*: *Reg.* v. *Gould*, 9 *C. & P.* 364. And it would seem, from a late decision, that declarations of the defendant accompanying such acts, may be received in evidence, even though the confession itself may be inadmissible. *R.* v. *Griffin*, *R. & R.* 151.

*How proved.*]—When a defendant pleads guilty, if he persist in his plea, it is immediately recorded by the proper officer; and the same, where a defendant yields himself to the Queen's mercy, and desires to submit to a small fine. In other cases the admission or confession must be proved at the trial. And in a criminal case, the judge will not allow the case to be tried upon admissions made by the attornies on both sides, nor unless they be made at the trial by the defendant or his counsel. *Reg.* v. *Thornhill*, 8 *C. & P.* 575.

A confession before a magistrate, if taken down in writing at the time, should be produced, and proved to have been duly taken. And it was formerly supposed that it must be proved by the magistrate who took and signed it, or by his clerk who wrote it; *see* 1 *Hale*, 585; 2 *Hawk. c.* 46, *s.* 43; 1 *Leach*, 240, 348: *R.* v. *Bell*, 5 *C. & P.* 162; but it is now clearly settled, that it may be given in evidence on the prisoner's hand-writing being proved by any person who was present at his examination; *R.* v. *Chappel*, 1 *M. & Rob.* 395: *R.* v. *Hopes*, *Id.* 396, *n.*; 7 *C. & P.* 136: *R.* v. *Foster*, 7 *C. & P.* 148: *R.* v. *Rees*, *Id.* 568: *R.* v. *Reading*, *Id.* 619; although it is very desirable that, in serious cases, it should be proved by the magistrate or his clerk, if possible. *Reg.* v. *Pikesley*, 9 *C. & P.* 124. If it be clearly shewn that the examination of the defendant was not reduced to writing, or, perhaps, if the writing be lost or destroyed, then parol evidence of it may be admitted. *R.* v. *Fearshire*, 1 *Leach*, 202. *See R.* v. *Lamb*, 2 *Leach*, 582. Until the contrary

be shewn, it shall be intended that the magistrate did his duty, and took down the examination of the defendant in writing. *R.* v. *Jacob*, 1 *Leach*, 309. And where the magistrate returned with the depositions that the prisoner said, "I decline to say anything," parol evidence of a confession alleged to have been made by the prisoner in the presence of the magistrate, and while under examination, was rejected. *R.* v. *Walter*, 7 *C. & P.* 267. But, upon clear and satisfactory evidence, it will be competent to prove something said by the defendant, beyond what is taken down by the magistrate. *Rowland* v. *Ashby*, *Ry. & M. N. P.* 231: *R.* v. *Harris*, 1 *Mood. C. C.* 338: *Reg.* v. *Wilkinson*, 8 *C. & P.* 662. So, if the examination taken in writing be inadmissible by reason of irregularity, parol evidence of what he said at the time of the examination may be received.—*per Tindal*, C. J., in *R.* v. *Reed*, *M. & Moo.* 403. Where the magistrate's clerk, in taking down the statement of several prisoners charged with the same offence, had left a blank where either of the prisoners had mentioned the name of another of them, the judge would not allow those blanks to be supplied by parol evidence. *Reg.* v. *Morse*, 8 *C. & P.* 605. By stat. 7 *G.* 4, *c.* 64, *ss.* 2, 3, the magistrate is expressly directed to subscribe the examination, which, although usual, was not before requisite. The signature of the defendant is not, however, required, and is only for precaution and facility of proof. When the prisoner affixes his mark only, it must be proved that the examination was correctly read over to him. *R.* v. *Chappel*, 1 *M. & Rob.* 395. Where the examination was taken in writing, but the prisoner refused to sign it, without saying whether it was correct or not, Mr. Baron *Wood* refused to admit it in evidence. *R.* v. *Telicote*, 2 *Stark.* 483. But in *Lamb's case*, 2 *Leach*, 582, where it appeared that the written examination, at the time it was taken, was read over to the prisoner, and that he admitted it to be true, but refused to sign it, the judges held that it was admissible in evidence, in the same manner as if he had signed it; that a prisoner's confession, if not reduced to writing, may be given in evidence against him, and *a fortiori*, if in writing, although not signed by him; for its being reduced to writing renders it less doubtful, and entitles it to greater credit. *See also R.* v. *Thomas*, 2 *Leach*, 637. So, if the prisoner admit, when examined before the magistrate, that the deposition of a witness examined against him is true, that deposition may be read at the trial as part of the prisoner's statement, although the witness himself have been examined at the trial. *R.* v. *John*, 7 *C. & P.* 324. But the statement of one of several prisoners, brought before a magistrate for the same offence, cannot be read in evidence against the others; because they are only called upon to answer the depositions of the witnesses, taken on oath, not the statements of their fellow-prisoners. *Reg.* v. *Swinnerton*, *C. & Mar.* 593. Where the defendant was examined before the Lords of the Council, and a witness took notes of his examination, which was not signed by or read over to the defendant, it was holden, that the witness might refresh his memory from the notes, but that the minutes were not admissible as a judicial examination. *R.* v. *Layer*, 16 *St. Tr.* 215. The effect of the statute, so far as regards the evidence of a confession, seems to be, that a written examination, taken as the statute directs, is evidence *per se*, and the only admissible evidence of the defendant's having made a declaration of the things therein contained; whereas, at common law, (unless the defendant signed the paper, or, on its being read, allowed it to be

true), the confession must have been proved by some person who heard it, and the writing could only have been made use of by the person who wrote it, for the purpose of refreshing his memory. *See* 2 *Russ.* 650. It may be observed that, if the examination of the prisoner be not put in evidence in the first instance, it cannot be afterwards read as evidence in reply, to contradict a defence set up at the trial which is inconsistent with it. *R.* v. *Powell, C. & Mar.* 500.

Admissions or confessions to other persons than magistrates, if in writing, are proved as any other written instrument; if by parol, they are proved by parol evidence of some person who heard them. What the prisoner has been overheard to say to another, or to himself, is equally admissible; though it is a species of evidence to be acted on with much caution, as being liable to be unintentionally misrepresented by the witnesses. *See R.* v. *Simons,* 6 *C. & P.* 540. In all cases of high treason, a confession in open court precludes the necessity of proving the treason by witnesses. 7 *&* 8 *W.* 3, *c.* 3, *s.* 2; 1 *Ed.* 6, *c.* 12, *s.* 22; 5 *&* 6 *Ed.* 6, *c.* 11, *s.* 12; *Fost.* 241. So also, the confession of an overt act upon an examination before a magistrate or other person having authority for that purpose, if proved at the trial by two witnesses, is sufficient to convict the defendant; *R.* v. *Francia,* 1 *East, P. C.* 133, *n.*; *Fost.* 243; but evidence of a confession to a person not having such authority, although proved by two or more witnesses, can only be received in corroboration of the other evidence in the case; and the treason must still be proved by two witnesses, notwithstanding. *R.* v *Willis,* 8 *St. Tr.* 250, 255; *and see Fost.* 243. This, however, must be considered as having reference only to confessions given in evidence as proof of the offence charged in the indictment; but a confession before a magistrate or other person may be given in evidence to prove a collateral fact, as, for instance, that the defendant is a natural-born subject. *R.* v. *Vaughan,* 5 *St. Tr.* 25: *R.* v. *Smith, Fost.* 242, or the like, and may be proved by one witness, as in ordinary cases.

*Effect of.*]—When the defendant, in open court, confesses that he is guilty of the offence with which he is charged in the indictment, a trial is unnecessary, and the court may immediately proceed to award judgment. The courts, however, are usually very backward in receiving and recording such a confession, and will generally advise the defendant to retract it, and plead to the indictment. 2 *Hale,* 225. So, in misdemeanors, if the court receive the submission of the defendant, without putting him to a direct confession, the fine may be imposed without further proceeding, 2 *Hawk. c.* 31, *s.* 2. A free and voluntary confession of guilt made by a defendant, whether under examination before magistrates or otherwise, if duly made and satisfactorily proved, is sufficient at once to warrant a conviction, without any corroborative evidence *aliunde. R.* v. *White, R. & R.* 508: *R.* v. *Tippett, Id.* 509: *R.* v. *Eldridge, Id.* 440: *R.* v. *Faulkner, Id.* 481: *R.* v. *Stone, Dy.* 204: *R.* v. *Francis,* 6 *St. Tr.* 58: *R.* v. *Lambe,* 2 *Leach,* 554: *R.* v. *Wheelings,* 1 *Leach,* 311, *n.* But this must be understood of a direct and positive confession; for admissions by implication are not entitled to the same weight.

In all cases, the whole of the confession should be given in evidence; for it is a general rule, that the whole of the account which a party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion

of a fact favourable to him, not merely as evidence that he made such assertion, but admissible evidence of the matter thus alleged by him in his discharge. 4 *Taunt.* 245: *and see the Queen's case,* 2 *B. & B.* 294. It has been said, that if there be no other evidence in the case, or none which is incompatible with the confession, it must be taken as true; *R.* v. *Jones,* 2 *C. & P.* 620; but the better opinion seems to be that, as in the case of all other evidence, the whole should be left to the jury, to say whether the facts asserted by the prisoner in his favour be true. *Smith* v. *Blandy, Ry. & M. N. P.* 259: *R.* v. *Higgins,* 3 *C. & P.* 603; *R.* v. *Clewes,* 4 *C. & P.* 221.

It is also necessary to observe, that a man's confession is only evidence against himself, and not against his accomplices; 1 *Hale,* 585; 2 *Hawk. c.* 46, *s.* 3: *R.* v. *Tong, Kel.* 17, 18: *R.* v. *Boroski,* 3 *St. Tr.* 474; although he charge his accomplice in his hearing, and the accomplice do not deny it. *R.* v. *Appleby,* 3 *Stark.* 33. So, the confession of a principal is not evidence against an accessary to prove the guilt of the principal, which must be proved *aliunde, R.* v. *Turner,* 1 *Mood. C. C.* 347. In *Tinkler's case,* however, the dying declarations of an accomplice were holden by the judges to be good evidence against the principal; and the majority of the judges were of opinion that this evidence would of itself be sufficient to convict, although the testimony of the accomplice, if living, would not, unless corroborated by other evidence. 1 *East, P. C.* 354. (*See ante, p.* 114). Also, in cases of conspiracy, and of high treason in compassing the Queen's death, &c., anything said or written by one of the accomplices, not as a confession simply, but for the purpose of furthering the common design, is admissible evidence against the others. *R.* v. *Watson,* 2 *Stark.* 140, 141: *and see ante, p.* 109, *and Harrison's Dig. tit. Confession.*

It may be here observed, that it has been laid down that *confessions* ought not to be opened by the prosecuting counsel, in stating the case; but that other declarations of or conversations with the prisoner, which are intended to be given in evidence, ought to be opened, in order to give the prisoner the benefit of any discrepancy between the opening and the evidence. *R.* v. *Orrell,* 1 *M & Rob.* 467: *R.* v. *Davis,* 7 *C. & P.* 785: *R.* v. *Hartel, Id.* 773.

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## Sect. 2.

### PRESUMPTIONS.

Presumptive, or (as it is usually termed) circumstantial evidence, is receivable in criminal as well as in civil cases: and indeed the necessity of admitting such evidence is more obvious in the former than in the latter; for, in criminal cases, the possibility of proving the matter charged in the pleading by direct and positive testimony is much more rare than in civil cases.

A presumption is, where some facts being proved, another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. The fact thus assented to is said to be presumed, that is, taken for granted until the contrary be proved by the opposite party; *stabitur præsumptioni donec probetur in contrarium. Co. Lit.* 273. And it is adopted the more readily, in proportion to the

difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it or of proving facts inconsistent with it, if it really never occurred.

These presumptions are of three kinds: *violent* presumptions, where the facts and circumstances proved *necessarily* attend the fact presumed; *Gilb. Ev.* 157; *probable* presumptions, where the facts and circumstances proved *usually* attend the fact presumed; 3 *Bl. Com.* 372; and *light* or *rash* presumptions, which, however, have no weight or validity at all. *Ib.; Gilb. Ev.* 157; *Co. Lit.* 6. *b.* If, upon an indictment for murder, it were proved that the deceased was murdered in a house, and that the defendant was immediately afterwards seen running out of it with a bloody sword in his hand; these facts raise a violent presumption that the defendant was the murderer; for the blood, the weapon, and the hasty flight, are all circumstances necessarily attending the fact presumed, namely, the murder. *Co. Lit.* 6. *b.; Staundf.* 179 *a; Gilb. Ev.* 157. So, upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but, if the property were not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and entitled to no weight. *R.* v.———, 2 *C. & P.* 459. And if the prisoner give a reasonable account of the manner in which he became possessed of the goods, this will so far rebut the presumption, as to throw it upon the prosecutor to negative that account. *R.* v. *Crowhurst*, 1 *C. & P.* 370. Such presumption will, of course, also vary according to the nature of the property stolen, and whether it be or be not likely to pass readily from hand to hand. *See R.* v. *Partridge*, 7 *C. & P.* 551. So, upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was afterwards found in the possession of the defendant, raises a probable presumption that the defendant was present and concerned in the arson. *See R.* v. *Rickman*, 2 *East, P. C.* 1035. Where, upon an indictment for perjury, in falsely taking the freeholder's oath in the name of J. W. at a parliamentary election, it was proved that the freeholder's oath was administered to a person who polled on the second day of the election by the name of J. W.; that there was no such person in fact as J. W.; that the defendant voted on the second day, though he was not a freeholder; that he did not vote in his own name or in any other than the name of J. W.; that there was but one false vote given on the second day's poll; and that the defendant some time afterwards boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid he should be *pulled up for his bad vote*; the court held that this was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge in the indictment. *R.* v. *Price*, 6 *East*, 323. Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, proof that the defendant has passed other forged notes raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; and if, in addition to this, it be proved that the defendant, when he passed these notes, gave a

false name or address, it amounts to a violent presumption of his guilty knowledge. And the same upon indictments for uttering counterfeit money. (*See ante, p.* 103).

In addition to the presumptions which a jury may make from circumstantial evidence, there are also presumptions in law. Thus, in murder, the law presumes *malice* from the act of killing, until the contrary be proved by the defendant. *Fost.* 255; 1 *East, P. C.* 340. And the law also infers that every man must contemplate the necessary consequence of his own act. *R.* v. *Dixon*, 3 *M. & Sel.* 15. Thus, the uttering of a forged stock receipt to a person who employed the prisoner to purchase stock to that amount, and advanced the money, was holden sufficient evidence of an attempt to defraud, notwithstanding the belief of the party to whom it was uttered, that the prisoner had no such intention. *R.* v. *Shepherd, R. & R.* 169. So, where a man was indicted under the repealed statute 43 *G.* 3, *c.* 58, for setting fire to a mill, with intent to injure the occupiers, it was holden that the intent might be inferred from the act. *R.* v. *Farrington, R. & R.* 207. And upon an indictment for forgery, an intention to defraud the person who would have to pay the instrument if it were genuine, may be inferred, even though the instrument be so framed as not to impose upon him, and the intention to defraud be general, and not confined or in any way pointed to the person by whom, if genuine, the instrument would be paid. *R.* v. *Mazagora, R. & R.* 291: *Reg.* v. *Hill*, 2 *Mood. C. C.* 30; 8 *C. & P.* 274. Where a man has in possession a large quantity of counterfeit coin unaccounted for, it may be inferred that he procured it with intent to utter it, if there be no evidence that he was the maker. *R.* v. *Fuller, R. & R.* 308. So, in every case, intention can be but matter of presumption, arising either from the facts stated in the indictment, or from extrinsic facts stated in evidence. *See ante, p.* 104.

It may also be necessary to observe, that the law presumes every man to be innocent, until the contrary be proved. *R.* v. *Twyning*, 2 *B. & Ald.* 386; *Sissons* v. *Dixon*, 5 *B. & C.* 758. It is also a maxim of law, that "*omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium;*" upon which ground it will be presumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed. *R.* v. *Verelst*, 3 *Camp.* 432; *R.* v. *Gordon*, 1 *Leach*, 315; *Reg.* v. *Murphy*, 8 *C. & P.* 297; *Reg.* v. *Newton*, 1 *C. & K.* 469.

Although presumptive evidence must, from necessity, be admitted, yet in felony and treason it should be admitted cautiously. And Sir Matthew Hale, in particular, lays down two rules, most prudent and necessary to be observed, in this respect: *first*, Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them unless an actual felony be proved of such goods; and *secondly*, Never to convict any person of murder or manslaughter, till at least the body be found—on account of two instances he mentions, where persons were executed for the murder of others who were then alive, although missing. 2 *Hale*, 290.

## SECT. 3.

### WRITTEN EVIDENCE.



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### 1. *Records*.

*Public Statutes.*]—PUBLIC STATUTES, the rules of the common law, and the general customs of the realm, are never required to be set forth in the pleadings, or proved at the trial: because the court are bound, *ex officio*, to take notice of them. And therefore, when the printed copy of a public statute is produced at a trial, as is frequently the case, it is not to be deemed to be produced as evidence, but rather in aid of the memory of the court and jury. *See Gilb. Ev.* 10. By stat. 41 *G.* 3, *c.* 99, *s.* 9, the statutes of Ireland prior to the union, printed and published by the Queen's printer, shall be received as conclusive evidence in any court in Great Britain.

Where the printed copy of a public statute was produced in proof of certain facts recited in the preamble, the court held that it was admissible evidence for that purpose. *R.* v. *Sutton*, 4 *M. & Selw.* 532.

*Private Statutes.*]—Private statutes and particular customs must be set forth in pleading, and proved if put in issue. A private statute is proved by an examined copy of the parliament roll, *Gilb. Ev.*, 12: *and see R.* v. *Shaw*, 12 *East*, 479, unless it be otherwise directed by the statute itself. And by the 8 & 9 *Vict. c.* 113, *s.* 3, all copies of private and local and personal acts of parliament, not public acts, if purporting to be printed by the Queen's printers, shall be admitted as evidence thereof by all Courts, judges, justices, and others, without any proof being given that such copies were so printed. A private statute containing a clause that it shall be deemed and taken to be a public act, and shall be judicially noticed without being specially pleaded, must be proved in the regular manner, in order to make it evidence against strangers of the *facts* stated in it; *Brett* v. *Beales*, 1 *M. & M.* 421; but the printed copy is *admissible* in evidence, in the same manner as in the case of a public act properly so called. *Ib.*: *Woodward* v. *Cotton*, 1 *C. M. & R.* 44: *Beaumont* v. *Mountain*, 10 *Bing.* 404: 4 *M. & Scott*, 177.

*Records of the Queen's Courts.*]—A record is proved, either by producing the record itself, or by an exemplification of it under the great seal, which is itself a record, and needs no further proof; *Gilb. Ev.* 14: *Leyfield's case*, 10 *Co.* 93; or by an exemplification of it under the seal of the court (whether of a court of common law, or of one created by act of Parliament), *Olive* v. *Gwin*, 2 *Sid.* 146; *Gilb. Ev.* 19, 17; 10 *Co.* 93: *and see Hardr.* 120, and which also needs no further proof; *Gilb. Ev.* 19; or by an examined copy, 10 *Co.* 92, *b*: 2 *Ro. Abr.* 678, *l.* 45: *Hardr.* 119, according to circumstances.

Where matter of record is but mere inducement, and not the gist of the pleadings, it may be proved by an examined copy. *Gilb. Ev.* 26. This copy may be had from the officer in whose custody the

record is; and the person who is to prove it at the trial must examine the copy whilst the officer reads the record. It is not necessary that the officer should also read the copy whilst the witness examines the record. *Reid* v. *Marginson*, 1 *Camp.* 469: *Giles* v. *Hill*, *Id.* 471, *n.*: *Rolf* v. *Dart*, 2 *Taunt.* 52.

But where matter of record forms the gist of the pleading, it must be proved by the production of the record itself, or by an exemplification of it. If it be a record of the same court in which it is pleaded, the record itself must be produced; (*see R.* v. *Shaw*, *R. & R.* 526); if it be a record of another court, an exemplification (that is, a copy under seal) of it is sufficient.

Where the record of an inferior court forms the gist of a pleading in the court of Queen's Bench, and it is to be proved accordingly by an exemplification, sue out a *certiorari*, either with the cursitor, or with the proper officer of the Queen's Bench, directed to the chief justice, judge, or officer of the inferior court in whose custody the record is supposed to be, requiring him to certify the record to the court of Queen's Bench; and thereupon an exemplification of the record, under the seal of the inferior court, will be transmitted to the court of Queen's Bench, to be there used as evidence. *See the form*, 6 *Went.* 24. But where a record of the court of Queen's Bench is to be proved in an inferior court, you must sue out a *certiorari* with the cursitor, directed to the chief justice of the Queen's Bench, requiring him to certify the record to the court of Chancery; and the record being thereupon accordingly certified, an exemplification of it under the great seal is thence sent by *mittimus* to the inferior court, to be there used as evidence. *See Gilb. Ev.* 14, 15.

So, where the record of a court of quarter sessions is pleaded in a court of oyer or terminer, or the converse, or where the record of one court of oyer and terminer is pleaded in another, the exemplification, in strictness, should in like manner be obtained upon *certiorari*; but I believe the general practice is, to apply simply to the clerk of the peace or clerk of assize, who will make it out for you accordingly, without writ, or will attend with the record itself at the trial.

A record is very seldom the gist of a pleading in criminal cases, excepting on a plea of *auterfois acquit*, *&c.*, or upon an indictment for a felony after a previous conviction; and in the former, it is almost always a record of the same court that is pleaded. The record upon an indictment for a subsequent felony is proved by the production of the record itself, if it be a record of the same court, or by an exemplification, if it be the record of another court, as above mentioned. Or, it may be proved in the manner provided by statute, thus: By statute 7 & 8 *G.* 4, *c.* 28, *s.* 11, upon an indictment for a subsequent felony, after a previous conviction for felony, a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, is, upon proof of identity, sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same: 7 & 8 *G.* 4, *c.* 28, *s.* 11. (*See post, B. II. Part V.*)

In all other cases except those provided for by statute, where a copy of a record is given in evidence, it must be a copy of the whole record; because the omission of part might have the effect of altering the

sense and import of the residue. *Gilb. Ev.* 23; 3 *Inst.* 173. Records are not complete until delivered into court on parchment; therefore, a minute book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record. *R.* v. *Bellamy*, *R. & M. N. P.* 171: *R.* v. *Thring*, 5 *C. & P.* 507. Thus, to prove a verdict, you must give in evidence a copy of the whole record, including the judgment; *Bull. N. P.* 234: *Gilb. Ev.* 37; for otherwise it would not appear but that judgment had been arrested or a new trial granted; *Bull. N. P.* 234; *Pitton* v. *Walter*, 1 *Str.* 162; unless in the case of an issue out of Chancery, where no judgment is entered up. *Bull. N. P.* 234. But if it be required to prove merely that a certain trial was had, the *nisi prius* record, with the *postea* indorsed upon it, is sufficient evidence for this purpose; *Fisher* v. *Kitchingman*, *Barnes*, 449; *and see Foster* v. *Compton*, 2 *Stark.* 364; or if the *postea* be not drawn up, it may be proved by the production of the *nisi prius* record, if the minute of the verdict be indorsed on the jury panel by the officer of the court. *R.* v. *Brown*, *Moo. & M.* 315; 8 *B. & C.* 341. If it be necessary to prove what a witness said upon a former trial, it may be read from the judge's notes, or proved upon oath from the notes or recollections of any person who was present at the time; *Doncaster* v. *Day*, 3 *Taunt.* 262; 12 *Mod.* 318; *Gilb. Ev.* 68, 69; but in order to let in such evidence, it must be first proved that the former trial took place; and this can be done only by giving in evidence an examined copy of the record, *Gilb. Ev.* 68, or the *nisi prius* record with the *postea* indorsed on it, as above mentioned. *Pitton* v. *Walter*, 1 *Str.* 162.

In order to prove a writ, if it be the gist of the pleading, you must get it returned, and then procure and give in evidence an examined copy of it. But if it be matter of inducement merely, it is not necessary that it should be returned or proved by an examined copy; *Gilb. Ev.* 39; but the writ itself, if in your possession, may be given in evidence; or if in the possession of the other party, then, upon proving the service of a notice upon him to produce it, and that it has been returned and filed, but that it was in the other party's possession after the day on which it was returnable, you will be allowed to give a copy of it in evidence. *Edmonstone* v. *Plaisted*, 4 *Esp.* 160. *See Knight* v. *Dawler*, *Hardr.* 223: *Wright* v. *Pindar*, *Alleyn*, 18. Until the non-production is sufficiently accounted for, parol evidence of its contents is not admissible. *Lester* v. *Jenkins*, 8 *B. & C.* 339.

A judgment of the House of Lords is proved by an examined copy of it from the minute book; *Jones* v. *Randall*, *Cowp.* 17; which may be had, upon application, at the office of the Clerk in Parliament.

An allegation that judgment was "entered up" in an action, is proved by the production of the book from the judgment-office, in which the *incipitur* is entered. *Reg.* v. *Gordon*, *C. & Mar.* 410.

Convictions before justices of peace are proved by examined copies, which the clerk of the peace of the proper county will make out for you upon an application for that purpose. *R.* v. *Gilkes*, 8 *B. & C.* 439. And by stat. 7 & 8 *G.* 4, *c.* 29, *s.* 74, and 7 & 8 *G.* 4, *c.* 30, *s.* 40, and several other statutes (*see the different titles, post, Book II.*), copies of convictions for offences within those acts respectively, certified by the proper officer of the court, or proved to be true copies shall be sufficient evidence to prove a conviction of a former offence.

To prove the passing of a fine, the chirograph is conclusive evidence

without further proof. *Plowd.* 110 *b; Gilb. Ev.* 24; *Bull. N. P.* 229; but if it be necessary to prove the proclamations, that must be done by an examined copy. *Gilb. Ev.* 25: *Doe* v. *Bluck,* 6 *Taunt.* 485. A common recovery is proved in the same manner as an ordinary judgment. *See stat.* 27 *El. c.* 9; 14 *G.* 2, *c.* 20, *s.* 4.

To prove a deed which has been enrolled, the endorsement of the enrolment is evidence sufficient, without further proof of the deed; *Gilb. Ev.* 24, 96: *Smartle* v. *Williams,* 1 *Salk.* 280; *and see Kinnersley* v. *Orpe,* 1 *Doug.* 56; 8 *B. & C.* 755; but if the deed be lost, it can be proved only by an examined copy of the enrolment. *Gilb. Ev.* 25; 3 *Camp.* 20. All this, however, must be understood of deeds only which need enrolment; for if any other deed be enrolled, (as, for instance, a bargain and sale for years, or the like), and be afterwards offered in evidence, it must be proved in the ordinary way, by the subscribing witness. *Gilb. Ev.* 99: *Page's Case,* 5 *Co.* 54; *Goodson* v. *Jones, Styles,* 545: *Smartle* v. *Williams,* 1 *Salk.* 280.

*Letters Patent.*]—Letters patent may be given in evidence, without further proof; or they may be proved by exemplifications under the great seal. *See* 1 *Saund.* 189, *n.*

### 2. *Matters* quasi *of Record.*

*Proceedings in Parliament.*]—Entries in the journals of the House of Lords and House of Commons may be proved by examined copies from their minute books. *Jones* v. *Randall, Cowp.* 17; 2 *Doug.* 594; or by copies purporting to be printed by the printers to the Crown, or to either House of Parliament. 8 & 9 *Vict. c.* 113, *s.* 3. The journals of the House of Lords have been holden evidence to prove not only an address of the Lords to the King, but the King's answer also. *R.* v. *Holt,* 5 *T. R.* 445. But the resolutions of either House, with a view to ulterior proceedings, are no evidence of the facts therein stated; as, for instance, when the House of Commons resolved that a plot against the government existed, the resolution was holden to be no evidence of the existence of such a plot. 4 *St. Tr.* 39.

*Proceedings in Courts of Equity.*—The bill and answer may be proved by examined copies. *Gilb. Ev.* 56; *Hennell* v. *Lyon,* 1 *B. & Ald.* 182: *Hodgkinson* v. *Willis,* 3 *Camp.* 401; which may be obtained from the Six Clerk's Office, upon an application for that purpose. In order to prove the answer, you are obliged to give in evidence an examined copy of the bill as well as of the answer; *Gilb. Ev.* 55; but where it was proved by the proper officer that he had searched diligently in the office for the bill, and could not find it, the court allowed the answer to be read without it. *Ib. See Ewer* v. *Ambrose,* 4 *B. & C.* 25; 8 *B. & C.* 765. There is one exception, however, to this, namely, that upon an indictment for perjury alleged to have been committed in an answer, the answer itself must be produced, and it must be proved either that the party was sworn to it, or that the name subscribed to it is his handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose. *R.* v. *Morris,* 2 *Bur.* 1189; *R.* v. *Benson,* 2 *Camp.* 508. *See R.* v. *Spencer, Ry. & M. N. P.* 97. And the same as to depositions in equity. *See, as to the ad-*

*missibility of decrees in equity*, *Laybourn* v. *Crisp*, 4 *M.* & *W.* 320: 8 *C.* & *P.* 397: *Pim* v. *Curell*, 6 *M.* & *W.* 234.

A decree in equity, if it remain in paper, may be proved by an examined copy, together with an examined copy of the bill and answer; but if it have been enrolled, it must be proved by an exemplification under the great seal, which requires only to be produced in evidence, without further proof.

*Proceedings in Courts of Law, not being Records.*]—Rules of court are proved by office copies; *Selby* v. *Harris*, 1 *Ld. Raym.* 745: *Duncan* v. *Scott*, 1 *Camp.* 102, 471, *n.*; it is not necessary to have them examined. A rule of court is evidence that the court have ordered as is therein stated; but it is not evidence of any matters in it which are the mere suggestions of the party who obtained it. *Woodroffe* v. *Williams*, 6 *Taunt.* 19.

A judge's order may be proved by the production of the order itself, or by an office copy of the rule by which it has been made a rule of court. *Still* v. *Halford*, 4 *Camp.* 17. And by 8 & 9 *Vict. c.* 113, *s.* 2, all courts, judges, justices, masters in chancery, masters of courts, commissioners, judicially acting, and other judicial officers, are thenceforth to take judicial notice of the signature of any of the equity or common-law judges of the superior courts at Westminster, attached or appended to any decree, order, certificate, or other judicial or official document.

Affidavits, being admissions upon oath, are evidence as such against the parties who made them. *Gilb. Ev.* 51, 56: *Harmer* v. *Davis*, 7 *Taunt.* 577. When filed with the clerk of the rules in the Queen's Bench, or with the secondaries in the common Pleas, they may, it should seem, be proved by office copies; but if filed with any other officer, such as a filacer, the signer of the writs &c., they must be proved by examined copies, or produced. All other affidavits not filed can be proved only by production of the affidavits themselves, and by parol evidence of their having been sworn; *Gilb. Ev.* 56; or, if not proved to be sworn, yet perhaps they may be received as admissions of the deponents, upon proof of their hand-writing. *See Gilb. Ev.* 56. Upon an indictment for perjury in an affidavit, however, the affidavit must in all cases be produced, whether filed or not, and it must be proved in the same manner as an answer to a bill in equity under the same circumstances. *R.* v. *James*, 1 *Show.* 397: *Crook* v. *Dowling*, 3 *Dougl.* 75: *Rees* v. *Bowen*, *M'Clel.* & *Y.* 383. Where an affidavit purported to have been sworn before a public commissioner, but his commission was not proved, *Patteson*, J. held the affidavit to be admissible, and that proof of the commissioner's acting was sufficient. *R.* v. *Howard*, 1 *M.* & *Rob.* 187.

A cognovit filed in court may be proved by an examined copy, together with proof of the defendant's signature to the original. *Scott* v. *Lewis*, 7 *C.* & *P.* 349.

*Proceedings in the Ecclesiastical Courts.*]—The libel, answer, depositions, and sentence in the ecclesiastical courts, in matters within their jurisdiction, are proveable in the same manner as the bill, answer, depositions, and decree in equity. *See ante*, *p.*128 : *Gilb. Ev.* 66, 67 : *Com. Dig. Ev.* (C.3). Their sentence in matrimonial causes is in all cases evidence, and in all cases conclusive evidence, of the facts they establish, except in suits of jactitation. *Duchess of Kingston's case*, 11 *St. Tr.* 262 : *and see Clewes* v. *Bathurst*, 2 *Str.* 960, 961 : *Hardw.* 11, 18.

The practice of the ecclesiastical courts may, it seems, be proved in the courts of common law by parol evidence. *Beaurrain* v. *Scott*, 3 *Camp.* 388.

A copy of the probate of a will, under the seal of the ecclesiastical court, is sufficient evidence to prove a will of personal property, or that J. S. is the executor, or the like; and the seal of the court sufficiently authenticates it, without further proof. *Gilb. Ev.* 71; 1 *Roll. Abr.* 678: *R.* v. *Nethersal*, 4 *T. R.* 258: *Hoe* v. *Relthorpe*, 3 *Salk.* 154: *Bull. R. P.* 46: *and see Gordon* v. *Dyson*, 1 *B.* & *B.* 219. The production of the original will, with the act of the ecclesiastical court, ordering probate, is sufficient evidence of the executor's title, without accounting for the nonproduction of the probate. *Cox* v. *Allingham*, 1 *Jacob*, 514. And where by the practice of an ecclesiastical court, no book was kept, but grants of probate were recorded by a minute indorsed on, or entered at the foot of, the original will, and written by the officer of the court, it was held that the production of the will, with such minute on it, was sufficient. *Doe* d. *Edwards* v. *Gunning*, 2 *Nev.* & *Per.* 260: *Doe* d. *Basset* v. *Mew*, *Id.* 266. The copy of the probate is conclusive evidence in the above cases, that is, the other party shall not be permitted to allege that the will proved is not the last will and testament of the deceased. *Gilb. Ev.* 73: *Chichester* v. *Phillips*, *T. Raym.* 404—406: *Noel* v. *Wells*, *Sid.* 359; except upon an indictment for forging a will, in which the probate unrepealed is not conclusive evidence of the validity of the will, so as to bar the prosecution. *R.* v *Buttery*, *R.* & *R.* 342; but the prosecutor may give in evidence that the probate is forged, or that it was obtained by surprise. *Gilb. Ev.* 73, 47: *T. Raym. and* 2 *Sid.*, *ubi supra.* To prove a probate revoked, an entry of the revocation in the assignation book, in which all cases are officially entered, is good evidence. *R.* v. *Ramsbottom*, 1 *Leach*, 25, *n.*

Administration is proved by the production of the letters of administration, or by a certificate from the ecclesiastical court, that administration was granted; *Bull. R. P.* 246; or you may get a clerk from the Ecclesiastical Court to attend at the trial with the book of acts, containing the direction for letters of administration to be granted, and the surrogate's *fiat* for the same, *ib.*: *Elden* v. *Keddle*, 8 *East*, 187: *and see Davis* v. *Williams*, 13 *East*, 232.

*Proceedings in the Court of Admiralty.*]—The libel, answer, depositions, and sentence in the Admiralty Court are proved in the same manner as the bill, answer, deposition, and decree of a Court of equity. *See Com. Dig. Evidence*, (C. 1). The sentence is conclusive evidence of the facts it establishes, not only against those concerned in interest and persons claiming under them, but also against strangers. Thus, a sentence condemning goods as captured from the enemy, is conclusive evidence that they were so captured. *Sterling* v. *Vaughan*, 2 *Camp.* 228.

*Proceedings in Inferior Courts.*]—Judgments in a court baron, county court, or other inferior court, may be proved by producing the books in which they are entered; or, it should seem, by examined copies. *See Gilb. Ev.* 74; *Com. Dig. Ev.* (C. 1).

The court rolls of a manor may be proved by examined copies; *Gilb. Ev.* 75; *R.* v. *Hains*, *Comb.* 337; 12 *Mod.* 24; or, it seems, by a copy under the steward's hand; *Com.* 128; 1 *Keb.* 576, 720; or you may get the steward or his deputy to produce them at the trial. *See Gilb. Ev.* 75.

Proceedings on commissions of bankrupt were formerly proved either by producing the proceedings themselves duly enrolled, 6 *G.* 4, *c.* 16, *s.* 96, or (if the original instrument in writing were filed in the office, or were officially in the possession of the Lord chancellor's secretary) by copies duly signed and attested, 6 *G.* 4, *c.* 16, *s.* 97. But now the record of all commissions of bankrupt, and of all proceedings under the same, heretofore entered of record under the stat. 6 *G.* 4, *c.* 16, are removed into the Court of Bankruptcy, established by 1 & 2 *W.* 4, *c.* 56, and are kept as records of that court; and all proceedings in bankruptcy and copies thereof, purporting to be sealed with the seal of that court, are to be received as evidence. 2 *&* 3 *W.* 4, *c.* 114, *s.* 9. And by the stat. 5 *&* 6 *Vict. c.* 122, *s.* 25, in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any fiat in bankruptcy, his deposition, purporting to be sealed with the seal of the Court of Bankruptcy, or a copy thereof purporting to be so sealed, shall in all cases be receivable in evidence of the matters therein contained.

A judgment or other proceeding of the court for the relief of insolvent debtors, may be proved by the production of an office copy of it, under the seal of the court. By 1 *&* 2 *Vict. c.* 110, *s.* 46, a copy of any order under that act vesting the estate and effects of any prisoner in the provisional assignee, or of the appointment of the assignee or assignees of such estate and effects, made upon parchment, purporting to have the certificate of the provisional assignee, or his deputy appointed for that purpose, indorsed upon it, and sealed with the seal of the court, shall in all courts and places, and without further proof, be recognised and received as sufficient evidence of such order and appointment having been made, and of the title of the provisional and other assignee or assignees under the same. And by the same statute, *s.* 105, a copy of the petition, vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer, having the custody of them, or his deputy, certifying the same to be a true copy and sealed with the seal of the court, is admissible in the same manner, without further proof of the same. *See Neale* v. *Isaacs*, 4 *B. & C.* 335; 6 *D. & R.* 484: *Carpenter* v. *Waite*, 3 *Moore*, 231; 3 *B. & B.* 625.

The informations and depositions of witnesses upon oath, before magistrates and coroners, in felonies and disdemeanors, (and which the magistrates and coroners are directed to put into writing and subscribe, and deliver to the officer of the court where the trial is to be, 7 *G.* 4, *c.* 64, *ss.* 2, 3, 4, 5), upon being produced at the trial, and proved to have been duly taken, may be given in evidence against the prisoner, if the person who made the depositions, &c., be dead, 1 *Hale*, 305; *Bull. N. P.* 242, or insane, (though the insanity be of a temporary nature, *Reg.* v. *Marshall*, *C. & Mar.* 147), *R.* v. *Eriswell*, 3 *T. R.* 720; or it appears satisfactorily to the court that he is kept out of the way by means of the procurement of the defendant; *R.* v. *Harrison*, 4 *St. Tr.* 492: *R.* v. *Morley*, *Kel.* 55; or, as it has been said, if he be sick, bedridden, or unable to travel. 1 *Phil. Ev.* 351; 1 *Hale*, 305; 2 *Hale*, 52: *Reg.* v. *Wilshaw*, *C. & Mar.* 144: *but see* 2 *Stark. Ev.* 487. But they cannot be thus read, if it merely appear that the witness is absent, and that the prosecutor has in vain used his endeavours to find him; *Kel.* 55; or that he is too ill to attend the assizes. *R.* v. *Savage*, 3 *C. & P.* 143. Nor can depositions be read upon an indictment for high treason. 5 *&* 6 *Ed.* 6; *Fost.* 337.

Depositions before magistrates, to be thus given in evidence, must be taken conformably with the statute, *R.* v. *Smith*, 2 *Stark.* 211, *n.* (*a*), and in the presence of the prisoner, so that he may have an opportunity of cross-examining the witness. *R.* v. *Paine*, 1 *Salk.* 281 : *R.* v. *Woodcock*, 1 *Leach*, 500 : *Pyke* v. *Crouch*, 1 *Ld. Raym.* 730 : *R.* v. *Dingler*, 2 *Leach*, 561 ; 1 *Str.* 162 ; *Bull. N. P.* 243 ; 1 *Holt*, 599; and nothing should be returned as a deposition, unless the prisoner had an opportunity of knowing what was said, and of cross-examining the party making it. *Reg.* v. *Arnold*, 8 *C. & P.* 621. But where the depositions were not wholly taken in the presence of the prisoner, but the witness afterwards, in his presence, was re-sworn, and the depositions repeated, and signed, the judges held that they were, under these circumstances, admissible evidence ; for the prisoner had then an opportunity of cross-examining the witness. *R.* v. *Smith*, *R. & R.* 339 ; 2 *Stark.* 208 ; 1 *Holt*, 614. In this respect there is a difference between depositions taken before a magistrate and before a coroner ; for the latter are said to be evidence, even though the party accused be not present. *Bull. N. P.* 242 : 1 *Ph. Ev.* 254, *per Buller*, J. : *R.* v. *Eriswell*, 3 *T. R.* 713. The reason given for this exception, is, that the coroner is an elective officer, appointed on behalf of the public to make inquiry of matters within his jurisdiction, who therefore is presumed to take the depositions fairly and impartially. *Bull. N. P.* 242. There is, however, no reported case in which this point has been directly determined ; but, although the propriety of this distinction has been questioned, (*see* 2 *Stark. Ev.* 492), the practice has nevertheless been to admit such depositions without inquiry whether the party accused was or was not present ; and in one case, *R.* v. *Purefoy*, *Maidstone Sum. Ass.* 1794, *Peake, Ev.* 64, *Hotham*, B. received depositions taken before a coroner, although it appeared, and was objected, that the defendant was not present. *See Jervis on Cor.* 217, 218. They must, however, in order to be admissible, appear to have been taken before the coroner *quà* coroner ; 1 *Ch. Cas.* 306 ; and must be signed by him. *R.* v. *England*, 2 *Leach*, 770. The depositions must appear to have been upon oath also ; 1 *Hale*, 586 : *Bull. N. P.* 242 ; but it is not necessary that they should be signed by the witness. *R.* v. *Fleming*, 2 *Leach*, 996. Where several depositions were taken on one sheet of paper, and at the foot of the whole was written "sworn before me," with the signature of the magistrate, the depositions previous to the last were held to be receivable, in evidence. *R.* v. *Osborne*, 8 *C. & P.* 113. But depositions taken in cross-examination, at a subsequent time to those in chief, and not signed by the magistrate, were held to be so irregular as to prevent the whole depositions from being read against the prisoner ; although both were sworn by the magistrate to have been accurately taken. *Reg.* v. *France*, 2 *M. & Rob.* 207. If duly taken, the depositions are admissible in evidence after the death of the deponent, not only upon the trial of the prisoner for the offence with which he was charged at the time they were taken, but also upon an indictment for any other offence. *R.* v. *Smith*, *R. & R.* 339. They may also be given in evidence by the defendant, in cases where the witnesses appear, in order to shew some material variance between their evidence at the trial and before the magistrate ; and may be read by the prosecutor, as it would seem, and certainly by the judge, to impeach the credit of a witness, who gives evidence contradicting statements contained in the deposition made by such witness in a former proceeding in the same case. *R.* v. *Oldroyd*, *R. & R.* 88. (*See post, p.* 154). They may

be proved by any competent witness present at the examination, and it is not essential that the magistrate or his clerk should be called to prove them. *Reg.* v. *Wilshaw, C. & Mar.* 145; (*see ante, p.* 119: *post, p.* 154).

The recent act "for enabling persons indicted for felony to make their defence by counsel or attorney," (6 & 7 *W.* 4, c. 114), provides, by *s.* 3, that all persons who shall be *held to bail or committed to prison* (which means finally committed for trial, and does not apply to persons committed for further examination only, *Reg.* v. *Lord Mayor of London,* 1 *Dav. & M.* 484) for any offence against the law, shall be entitled to require and have on demand, (from the person who shall have the lawful custody thereof, and who is thereby required to deliver the same), copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed on payment of a reasonable sum for the same, not exceeding 1½*d.* for each folio of 90 words: provided, that if such demand shall not be made before the day appointed for the commencement of the assizes or sessions at which the trial is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge, &c., if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged. And by *s.* 4, all persons under trial are entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had. This act does not make it compulsory on the magistrate, any more than it was before, to return *all* the depositions which have been taken against a prisoner: as well those of witnesses who have not been bound over to give evidence as of those who have; but the judges have intimated on several occasions that it is proper that they should do so, and also that they should return a full statement of all that the witnesses said, not merely of so much thereof as they deem material; so much time having been occupied, since the passing of this act, in endeavouring to establish contradictions between the testimony of the witnesses and their depositions, in the omission of minute circumstances in their statements before the magistrates. See *R.* v. *Simons,* 6 *C. & P.* 540: *R.* v. *Fuller,* 7 *C. & P.* 269: *R.* v. *Grady, Id.* 650: *R.* v. *Coveney, Id.* 667. *R.* v. *Thomas, Id.* 817. A prisoner is not entitled, under this statute, to a copy of *his own* statement returned by the magistrate, but only to a copy of the depositions of the witnesses against him. *Reg.* v. *Aylett,* 8 *C. & P.* 669. And the reading, on the part of the prosecution, of the prisoner's statement, returned with the depositions, does not give the prisoner the right to consider the depositions as in evidence on the part of the prosecution, though it appear that they were all taken before such statement was made; but if the prisoner wishes to have the whole or any particular part of the depositions read, he must read it as his evidence. *R.* v. *Pearson,* 7 *C. & P.* 671.

It may be observed, that the judges have power, by their general authority as a court of justice, to order a copy of depositions taken before a coroner to be given to a prisoner indicted for the murder of the party concerning whose death the enquiry took place before the coroner, although in a case where the coroner could not have been

compelled to return them under the 7 *G.* 4, *c.* 64, *s.* 4. *R.* v. *Greenacre*, 8 *C. & P.* 32. *See Reg.* v. *Walford*, 8 *C. & P.* 767.

As to the right of cross-examination on the depositions, *see post, p.* 152.

If the witness have been examined abroad, under the stats. 13 *G.* 3, *c.* 63 or 1 *W.* 4, *c.* 22, and have there proved original documents, those documents themselves must be transmitted and given in evidence in this country; copies are not admissible. *Reg.* v. *Douglas*, 1 *C. & K.* 670.

*Proceedings in Foreign Courts.*]—The judgments, &c. of foreign courts are proved by exemplifications under the seal of the court. And it must be proved that the seal affixed to the exemplification is the seal of the court; it is not sufficient to prove merely the judge's handwriting subscribed to it. *Henry* v. *Adey*, 3 *East*, 221. If, indeed, it be satisfactorily proved that the court has no seal, then an exemplification, signed by the chief judge of the court, would perhaps be received, upon proof of the judge's handwriting. *Alves* v. *Bunbury*, 4 *Camp.* 28. But it is not sufficient, for the purpose of letting in such evidence, to prove that the seal of the court is so much worn as no longer to make any impression; *Cavan* v. *Stuart*, 1 *Stark.* 525; nor will a copy signed by the clerk of the court be sufficient, even although it be proved that the court has no seal, *Appletone* v. *Braybrook*, 2 *Stark.* 6; 6 *M. & Selw.* 34. *See Flindt* v. *Atkins*, 3 *Camp.* 215, *n.* It may be necessary to state, that the rule here laid down for the proof of foreign judgments, &c., relates equally to the judgments of courts in the British colonies as to those of courts in countries unconnected with this kingdom. But records of the courts in Ireland may be proved by examined copies, &c., in the same manner as the records in this country. *But see Harris* v. *Saunders*, 4 *B. & Cr.* 411. It is necessary, however, that the court should be satisfied that it was with a *record* the copy was examined; and therefore, where the witness produced to prove the copy stated that he examined it with a parchment roll shewn to him in a room over the four courts at Dublin, without seeing from whence it was taken, or knowing the person who produced it to be an officer of the court, Lord *Ellenborough* refused to receive it in evidence. *Adamthwaite* v. *Synge*, 4 *Camp.* 372; 1 *Stark.* 183.

As to the proof of the laws of a foreign country: if not written, they may be proved by the parol evidence of witnesses of competent skill: if written, a copy properly authenticated must be produced. *Clegg* v. *Levy*, 3 *Camp.* 166: *Millar* v. *Heinrick*, 4 *Camp.* 155, per *Gibbs*, C. J.: *Lacon* v. *Higgins*, 3 *Stark.* 178. The witness to prove a foreign law must be a person *peritus virtute officii*, or *virtute professionis*. A Roman Catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such authorized to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Sussex Peerage Case*, 11 *Cla. & Fin.* 85; 1 *C. & K.* 213. Such a witness may refer to foreign law-books, to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence. *Id.*

The acts of state of a foreign government must be proved by copies examined with the public archives abroad; a copy printed and published abroad by the authorized printer of the foreign government will not, it seems, be sufficient. *Richardson* v. *Anderson*, 1 *Camp.* 65, *n.*

*Surveys, Inquisitions, &c.*]—Inquisitions taken by virtue of the Queen's writ, or of a commission under the seal of the Exchequer, &c., are proved by the production of the writ or commission and inquisition, or by an examined copy thereof if they have been returned and filed; and indeed it may be questionable whether they can be evidence at all, until returned and filed. 1 *Phil. Ev.* 392; *Cornish* v. *Searell*, 8 *B. & C.* 474.

Public surveys, many of which are to be found in the Exchequer, are proved by the production of them by the proper officer, without further proof. 1 *Phil. Ev.* 403.

Domesday-book, when evidence, (*see* 1 *Stark. Evid.*), must be produced; at the trial, if intended to prove the gist of the pleading; *Hob.* 188; but if intended to prove some collateral matter merely, an examined copy of that part of the book relating to it will be sufficient.

*Registers, &c.*]—Christenings, marriages, and burials, may be proved by the parish register in which they are entered, by giving in evidence either the register itself, or an examined copy of it. *Gilb. Ev.* 72; 2 *Bac. Abr. Ev.* (F). *See Walker* v. *Countess Beauchamp*, 6 *C. & P.* 552. Besides the register, some proof must be given of the identity of the parties married, &c. *Birt* v. *Barlow*, 1 *Dougl.* 170. By the 6 & 7 *Will.* 4, *c.* 86, *s.* 38, certified copies of entries sealed or stamped with the seal of the register Office established by that act, are to be received as evidence of the birth, death, or marriage to which they relate, without further or other proof of the entry. And by the stat. 3 & 4 *Vict. c.* 92 *s.* 6, all registers and records deposited in the General Register Office by virtue of that act, [non-parochial registers] except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, &c., which were deposited in the Registry of the Bishop of London in the year 1821, (*see s.* 20), shall be deemed to be in legal custody, and be receivable in evidence in all courts of justice; and provision is made for the production of them by the registrar-general. And *s.* 17 expressly provides, that in all criminal cases the original register or record shall be produced.

The Fleet books are not evidence of a marriage; *Read* v. *Passer*, *Peake*, 332; or for any purpose. *Doe* d. *Davies* v. *Gatacre*, 8 *C. & P.* 578. *See* 3 & 4 *Vict. c.* 92, *s.* 6, *supra.* The marriage of Jews is by a written contract, which is afterwards solemnly ratified in the synagogue. In order to prove such a marriage, it is not sufficient, it seems, to prove the religious ceremony by the parol testimony of some person who was present, but the contract must also be proved. *Horn* v. *Noel*, 1 *Camp.* 61.

The register of the navy, with the letters *Dd.* opposite to a name therein registered, (it being proved to be the practice of the navy office to write these letters opposite to the names of such persons as died), was holden admissible evidence of the death of a man, opposite to whose name these letters were written. *Bull. N. P.* 249; *R.* v. *Rhodes*, 1 *Leach*, 24.

The prison books of the Fleet and Queen's Bench prisons are admissible evidence to prove the time at which a prisoner was committed or discharged; *R.* v. *Aikes*, 1 *Leach*, 591; but they are not admissible to prove the cause of commitment. *Salte* v. *Thomas*, 3 *B. & P.* 188.

The poll books of an election are also admissible evidence, and

may be proved by an examined copy. *Mead* v. *Robinson, Willes,* 424: *Brocas* v. *Mayor of London,* 1 *Str.* 307. An entry in a family Bible, an examined copy of an inscription on a tomb-stone, a pedigree hung up in a family mansion, and the like, are admissible evidence in questions of pedigree. *Goodright* v. *Moss, Cowp.* 591; *and see* 4 *Camp.* 401; *T. Raym.* 84.

On the trial of an indictment for the non-repair of a highway, entries in an ancient parish book, produced by the churchwarden from the parish chest, were held receivable in evidence to shew who were the surveyors of the highways at that time. *Reg.* v. *Inhabitants of Pembridge, C. & Mar.* 157.

*Certificates, &c.*]—The certificates of bishops with respect to marriage, general bastardy, excommunication orders, and other the like matters, are received in evidence; *Co. Lit.* 74: *R.* v. *Mawbey,* 6 *T. R.* 637; so are the certificates of the judges in Wales respecting the practice of their courts, 6 *T. R.* 638; and so are the certificates of justices of peace as to a highway being in repair. 6 *T. R.* 619.

But the certificate of a British consul abroad is not admissible as evidence in the courts of this country. *Waldron* v. *Coombe,* 3 *Taunt.* 162: *Ex parte Church,* 1 *D. & R.* 324. Yet instruments of this description are daily sent here from abroad, under the mistaken idea that our courts receive them in evidence.

The mere production of a diploma of doctor of physic, under the seal of one of the universities, is not of itself evidence to shew that the party therein named is entitled to that degree. *Moises* v. *Thornton,* 8 *T. R.* 303. *See Collins* v. *Carnegie,* 3 *Nev. & M.* 703; 1 *Adol. & Ell.* 695. And although, by stat. 6 *G.* 4, *c.* 133, *s.* 7, the common seal of the Society of Apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate to which the seal is affixed, it must be proved to be the genuine seal of the society. *Chadwick* v. *Bunning, Ry. & M. N. P.* 306.

*Ancient Terriers, &c.*]—Ancient terriers, surveys, and maps of manors, &c., when evidence, must be produced at the trial, and such circumstances connected with them stated in evidence as may induce the court and jury to give credit to them. *See* 1 *Phil. Ev.* 419.

*Corporation Books, &c.*]—Entries in corporation books, and in the books of public companies, relating to things public and general, and entries in other public books, may be proved by examined copies. *R.* v. *Mothersell, Str.* 93, 307: *Mercers of Shrewsbury* v. *Hart,* 1 *C. & P.* 114. Entries in the books of the Custom-house, of the Bank, and of the East India Company, of the South Sea Company, or the like, may be proved in the same manner. *See Geery* v. *Hopkins.* 2 *Ld. Raym.* 851: *Warriner* v. *Giles,* 2 *Str.* 954, 1005: *Edwards* v. *Vesey, Hardw.* 128: 2 *Doug.* 593, *n.* 8: *Breton* v. *Cope, Peake,* 30: *Hodgson* v. *Fullarton,* 4 *Taunt.* 787: *Mortimer* v. *M'Allan,* 6 *M. & W.* 58. But instruments of a private nature, such as a letter found in the corporation chest, *R.* v. *Gwyn,* 1 *Str.* 401, or the like, must be proved in the ordinary way as any other instrument.

Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases, where it would have the effect of making a defendant furnish evidence to criminate

himself. *R.* v. *Heydon*, 1 *W. Bl.* 351 : *R.* v. *Purnell*, *Id.* 37 ; 1 *Wils.* 230 ; 1 *Ld. Raym.* 705 ; 2 *Id.* 927 ; 2 *Str.* 1210.

The production in evidence of many of the documents above mentioned has been much facilitated by the recent stat. 8 *&* 9 *Vict. c.* 113 : the first section of which enacts, that wherever by any act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament or any Committee of either House, or in any judicial proceedings, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same and without any further proof thereof, in every case in which the original record could have been received in evidence.

*Public Acts of State.*]—The Gazette, printed and published by the Queen's printer, is evidence of all acts of state. *R.* v. *Holt*, 5 *T. R.* 436. Therefore, a Gazette which stated that addresses had been presented to the King from several bodies of his subjects, expressive of their loyalty, was holden to be evidence of that fact. *Ib. See R.* v. *Gardner*, 2 *Camp.* 513. It is not evidence of a private matter contained therein, unless it be shewn that the party to be affected has read the article. *Harratt* v. *Wise*, 9 *B. & C.* 712. The mere production of the Gazette would seem to be sufficient, without proof that it was bought at the Gazette office, or from whence it came. *R.* v. *Forsyth*, *R. & R.* 277.

The Queen's proclamations in the Gazette are evidence, *see Van Omeron* v. *Dowich*, 2 *Camp.* 44, and are proveable by copies thereof purporting to be printed by the printers to the crown or to either House of Parliament. 8 *&* 9 *Vict c.* 113, *s.* 3. Where a proclamation recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of the offenders, it was holden to be admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those places. *R.* v. *Sutton*, 4 *M. & Sel.* 532.

So, the articles of war, printed by the Queen's printer, are evidence. *Brough* v. *Perkins*, 5 *T. R.* 442, 446. So, the almanack annexed to the common prayer book, (*R.* v. *Holt*, 6 *Mod.* 81), is evidence that such a day of the year was Sunday, or the like. *Page* v. *Fawcet*, *Cro. El.* 227 ; 1 *Leon.* 242 ; 1 *Sid.* 300 ; 6 *Mod.* 41.

As to the acts of state of a foreign government, *see ante, p.* 134.

### 3. *Written Instruments of a Private Nature.*

When a deed is to be given in evidence, the general rule is, that the deed itself must be produced at the trial. *Leyfield's case*, 10 *Co.* 92 *b*, 93. To this, however, there are some exceptions, arising from

necessity; as, where the deed is in the hands of the opposite party, *Read* v. *Brookman*, 3 *T. R.* 153: *Wymark's case*, 5 *Co.* 73 *a*, or has been lost by time or accident, or by any other casualty, as by fire, &c., *Read* v. *Brookman*, 3 *T. R.* 151, 153, *n.*, (*see Kensington* v. *Inglis*, 8 *East*, 273: *Brewster* v. *Sewell*, 3 *B. & Ald.* 296: *Freeman* v. *Arkell*, 2 *B. & C.* 494, *as to proof of the loss, &c.*), the contents of it may be proved by a copy, or other secondary evidence. *Leyfield's case*, 10 *Co.* 92 *b*: *Medlicot* v. *Joyner*, 1 *Mod.* 4. Upon indictments for forgery, however, it is the generally understood rule, that the prisoner cannot be convicted unless the forged instrument be produced. But in *R.* v *Hunter*, 3 *C. & P.* 592, 4 *C. & P.* 128, where it appeared that the deed alleged to be forged was in the custody of the defendant, who, after notice, refused to produce it, secondary evidence of the deed was received.

Secondly, as to the proof of the execution of the deed: if there have been no subscribing witness to it, then proof of the handwriting of the parties will be sufficient, the law in such a case presuming a delivery. But if the deed were attested, the execution must be proved by at least one of the subscribing witnesses. *Gilb. Ev.* 99: *Barnes* v. *Trompowsky*, 7 *T. R.* 266: *Breton* v. *Cope*, *Peake*, 31: *Manners* v. *Postan*, 4 *Esp.* 240: *and see England* v. *Roper*, 1 *Stark.* 304: unless perhaps, where the fact of execution is one of the admissions in the cause; *Milward* v. *Temple*, 1 *Camp.* 375: for even the acknowledgment of the party, *Abbot* v. *Plumbe*, 1 *Dougl.* 216, or his admission in an answer to a bill of discovery, is in this case deemed merely secondary evidence. *Call* v. *Dunning*, 5 *Esp.* 16; 4 *East*, 53: *Johnson* v. *Mason*, 5 *Esp.* 16: *and see* 5 *T. R.* 366. It does not appear necessary that the subscribing witness should swear that the deed was actually executed in his presence; if he were afterwards desired to attest it by the party who executed it, *Grellier* v. *Neale*, *Peake*, *N. P. C.* 146: *Powell* v. *Blackett*, 1 *Esp.* 97, or in the presence of the party, *Park* v. *Mears*, 3 *Esp.* 171, 2 *B. & P.* 217, and he attested it accordingly, this will be sufficient, provided the attestation and execution be done so nearly at the same time, as fairly to be deemed parts of the same transaction. *MS. E.* 1814. On the other hand, a person who even sees an instrument executed, but who is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness. *M'Craw* v. *Gentry*, 3 *Camp.* 232. To this rule, of proving the execution by the evidence of an attesting witness, however, there are many exceptions. *First*, where the execution forms one of the admissions in the cause. *Supra.* *Secondly*, where the deed (and the same as to a will, although it be less than thirty years since the testator's death, *Doe* d. *Oldnall* v. *Wolley*, 8 *B. & C.* 22) is thirty years old or upwards, the court will presume that it has been duly executed, and will not require it to be proved, *Bull. N. P.* 255; *Chelsea Water Works* v. *Cowper*, 1 *Esp.* 275, 278, provided possession have followed the deed, or some satisfactory account be given of it, and provided there be no erasure or interlineation in it, and that it do not import fraud; otherwise it must be proved as in ordinary cases, either by the attesting witness, or by evidence of his and the party's handwriting. 2 *Bac. Ab.*, *Ev.* (F); *Bull. N. P.* 255: *and see* 3 *Taunt.* 91. It may be necessary here to remark, that when you give an ancient obligation for the payment of money in evidence, you should be prepared to prove the payment of interest within the last twenty years, or other circumstances sufficient to rebut the presumption which the law will other-

wise raise of such obligation having been satisfied. *See* 1 *Burr.* 444; 2 *Str.* 826; 1 *W. Bl.* 532; 1 *T. R.* 272. *Thirdly*, where a deed enrolled (and to which enrolment was necessary) is given in evidence, it is not necessary to prove the execution of it by the subscribing witness; but it may be proved by the enrolment indorsed on it, or, if the deed be lost, by an examined copy of the enrolment, as already mentioned *ante, p.* 128. *Fourthly*, where one deed is recited in another, proof of the second deed is deemed proof of the one recited, as against the parties to the second deed and those claiming under them, 2 *Bac. Abr. Ev.* (F). *Fifthly*, if the name of a fictitious person be put as the only subscribing witness, evidence of the handwriting of the party alone will be sufficient. *Fasset* v. *Brown*, *Peake, N. P. C.* 23. So if the subscribing witness be since dead, *Nelson* v. *Whittall*, 1 *B. & A.* 19: *and see* 6 *East*, 85, or have became insane, 12 *Vin. Abr.* 224: *Currie* v. *Child*, 3 *Camp.* 283, or be abroad, out of reach of the process of the court, *Holmes* v. *Pontin*, *Peake, N. P. C.* 99: *Cooper* v. *Marsden*, 1 *Esp.* 2: *Willis* v. *Delancey*, 7 *T. R.* 265; 12 *Vin. Abr.* 224: *and see Hodnet* v. *Foreman*, 1 *Stark.* 90; whether there domiciled or not; *Prince* v. *Blackburn*, 2 *East*, 250; or if he have set out for the purpose of leaving the kingdom; *Ward* v. *Wells*, 1 *Taunt.* 461; or if from circumstances it may fairly be presumed that he has left the kingdom; *Wardell* v. *Farmer*, 2 *Camp.* 282: *Wyatt* v. *Bateman*, 7 *C. & P.* 586; or if it appear that he is serving in the navy, *Parker* v. *Hoskins*, 2 *Taunt.* 223, or the like; or if, after a *bonâ fide* serious and diligent inquiry, he cannot be found; *Cochlan* v. *Williamson*, 1 *Doug.* 93: *Cunliffe* v. *Sefton*, 2 *East*, 183; *Barnes* v. *Trompowsky*, 7 *T. R.* 266: *Crossby* v. *Percy*, 1 *Camp.* 303; 1 *Taunt.* 364: *Wardle* v. *Farmer*, 2 *Camp.* 282: *Wilman* v. *Worrall*, 8 *C. & P.* 280: *Earl of Falmouth* v. *Roberts*, 9 *M. & W.* 469; or if he be interested in the event of the suit, *Buckley* v. *Smith*, 2 *Esp.* 697: *Swire* v. *Bell*, 5 *T. R.* 371: *Godfrey* v. *Morris*, 1 *Str.* 34, (unless by the act of the party who calls him, *Hovill* v. *Stephenson*, 5 *Bing.* 493), or have become subsequently incompetent as a witness from infamy; *Jones* v. *Mason*. 2 *Str.* 833; *Peake, Ev.* 102: then, upon proof of any one of these circumstances, you will be permitted to give secondary evidence of the execution of the deed; that is, you may prove the deed by proving the handwriting of the witness and the party. *See Nelson* v. *Whittaker*, 1 *B. & Ald.* 19; *Moo. & M.* 286. And the rule on this subject is not affected by the power to examine witnesses abroad on interrogatories, under the stat. 1 *W.* 4, *c.* 22, *s.* 4. *Glubb* v. *Edwards*, 2 *M. & Rob.* 300. But the declarations of the witness himself as to the place of his residence, or hearsay statements of others on the subject, cannot be admitted to prove that he is abroad. *Doe* d. *Beard* v. *Powell*, 7 *C. & P.* 617. And although the subscribing witness have become blind, the instrument cannot be read without calling him. *Crank* v. *Frith*, 2 *M. & Rob.* 262; 9 *C. & P.* 197: but see *Wood* v. *Drury*, 1 *Ld. Raym.* 734: *Pedler* v. *Paige*, 1 *M. & Rob.* 258, *contra*. In a late case, Lord *Tenterden* held, that proof of the handwriting of the subscribing witness, who was dead, was sufficient, without any further proof of the identity of the parties than the identity of the name and description. *Page* v. *Mann*, *Moo. & M.* 79. *But see Whitelocke* v. *Musgrove*, 1 *C. & M.* 511: *Jones* v. *Jones*, 9 *M. & W.* 75. If there be two witnesses to the deed, and any of the circumstances just now mentioned apply only to one of them, the deed must of course be proved by the other. Also, by stat. 26 *G.* 3, *c.* 56, *s.* 38, deeds executed in the East

Indies, when the subscribing witnesses are resident there, may be given in evidence in Great Britain, upon proof of the handwriting of the parties and of the witnesses. *Sixthly*, if the deed appear to be attested by one or more persons, but in point of fact these persons never saw the deed executed or delivered, the attestation may be deemed a nullity, and the deed be proved by proving the handwriting of the party. *Phipps* v. *Parker*, 2 *Camp.* 635, 636: *Lee* v. *Ballard*, 3 *Esp.* 173, *n.*: *Grellier* v. *Neale*, *Peake*, *N. P. C.* 146: *but see Fitzgerald* v. *Elsee*, 1 *Camp.* 412. *Lastly*, where the subscribing witness at the trial is unable, or refuses, to disclose the truth, the deed may be proved by other witnesses. *Goodtitle* v. *Clayton*, 4 *Burr.* 2224: *Talbot* v. *Hodson*, 7 *Taunt.* 251.

Upon an indictment for forging a deed or other written instrument, all that it is incumbent upon the prosecutor to prove is, that the name subscribed to the deed is not the handwriting of the party whose signature it purports to be, which may now be proved by the party whose name is forged. 9 *G.* 4, *c.* 32, *s.* 2.

To prove a will of lands, it is only necessary to call one of the witnesses who attested it; *Peake*, *Ev.* 103: *Doe* v. *Smith*, 1 *Esp.* 391; *Skin.* 413; 2 *Str.* 1253: 1 *W. Bl.* 8; if the opposite party wish, he may call the others. *Bull. N. P.* 264. The witness called, however, should be prepared to give parol evidence of every circumstance attending the attestation, necessary to shew that the will was duly executed and attested according to the directions of the statute.

All other writings not under seal are proved in the same manner as deeds; that is, by the subscribing witness, if there be one; *Witherston* v. *Edgington*, 2 *Camp.* 94; 1 *Stark.* 53; 2 *Stark.* 180; or if not, then by proof of the party's handwriting. It is said, also, that a writing of this kind, if ancient, shall be received in evidence without proof, in the same manner as an ancient deed. *Tr. per pais*, 370: *but see Fortesc.* 43. If lost or destroyed, copies, or other secondary evidence of their contents, will (excepting in the case of forgery, *see ante*, *p.* 139) be received; but evidence must be given, at the same time, of the genuineness of the original instrument. *See Bunb.* 889; 1 *Atk.* 446; *C. & Mar.* 157.

The handwriting of a witness or party may be proved either by some person who has a knowledge of it, from having seen him write, *see Garrels* v. *Alexander*, 4 *Esp.* 37; 1 *Esp.* 14; 2 *Stark.* 164; 1 *Holt*, 420; even once only, *Wilman* v. *Worrall*, 8 *C. & P.* 380; *Warren* v. *Anderson*, 8 *Scott*, 384; or his surname only, *Lewis* v. *Sapio*, *M. & M.* 39: *Powell* v. *Ford*, 2 *Stark.* 39, *contra;* or from having been in the habit of corresponding with him; *Gould* v. *Jones*, 1 *W. Bl.* 384; *Harrington* v. *Fry*, *Ry. & M. N. P.* 90; or acting upon his correspondence with others; *R.* v. *Slaney*, 5 *C. & P.* 213; or the handwriting of a party may be proved by his own acknowledgment or admission. *Waldridge* v. *Kennison*, 1 *Esp.* 143. But it cannot be proved by comparing it with other writings, although confessedly of his handwriting, *Garrels* v. *Alexander*, 4 *Esp.* 37, 117: *Macferson* v. *Thoyte*, *Peake*, *N. P. C.* 20: *Stranger* v. *Searle*, 1 *Esp.* 14: *see Griffits* v. *Ivory*, 3 *Per. & D.* 179: *Hughes* v. *Rogers*, 8 *M. & W.* 123: *Younge* v. *Honner*, 2 *M. & Rob.* 536; 1 *C. & K.* 51. But on a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause. *Solita* v. *Yarrow*, 1 *M. &*

*Rob.* 133: *R.* v. *Morgan, Id.* 134, *n.*: *Griffith* v. *Williams*, 1 *C.* & *J.* 47: *Waddington* v. *Cousins*, 7 *C.* & *P.* 595: *Doe* d. *Perry* v. *Newton*, 1 *Nev.* & *P.* 1; 5 *Ad.* & *Ell.* 514. Also, perhaps, where the writing is so ancient that no witness can be found who can prove it. *Gilb. Ev.* 25, 26: *see Peake, N. P. C.* 20, *n.* A person, however, who is skilled in the detection of forgeries may prove that the writing is in a feigned hand, though he never saw the party write. *R.* v. *Cator*, 4 *Esp.* 117; 1 *Esp.* 14: *Goodtitle* v. *Braham*, 4 *T. R.* 496; *sed quære; see Carey* v. *Pitt, Peake, Ad. Ca.* 130. *See* 2 *Esp.* 714; 5 *B.* & *Ald.* 330: *R.* v. *Backler*, 5 *C.* & *P.* 118.

In a recent case, a defendant in ejectment produced a will, and on one day of the trial (which lasted several days) called an attesting witness, who swore that the attestation was his; and on his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures (none of them being in evidence for any other purpose of the cause) were shewn to him, and he stated that he believed them to be his. On the following day the plaintiff tendered as a witness to prove the attestation not to be genuine, an inspector at the Bank of England, who had no knowledge of the handwriting of the supposed attesting witness, except from having previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness; which admission he had heard made in court. The Court of Queen's Bench were equally divided in opinion on the question, whether his evidence was receivable. *Doe* d. *Mudd* v. *Suckermore*, 5 *Ad.* & *Ell.* 703; 2 *Nev.* & *Per.* 16.

Where a genuine instrument is to be given in evidence, care must be taken that it be duly stamped, if a stamp be necessary to its validity. *R.* v. *Hall*, 3 *Stark.* 67. But upon an indictment for forging a bill of exchange, the judges held, that it was not necessary that it should be stamped, in order to its being received in evidence; although in stat. 23 *G.* 3, *c.* 49, imposing a stamp duty upon bills of exchange, it is said, that no such instrument shall be received as evidence, unless it be first duly stamped. *R.* v. *Hawkeswood*, 2 *T. R.* 606; 1 *Leach*, 257: *R.* v. *Lee, Id.* 258, *n.*: *R.* v. *Morton*, 2 *East, P. C.* 955: *R.* v. *Teague, Id.* 979; 2 *Russ.* 341. So, upon an indictment for stealing a letter, a cheque inclosed though unstamped, was used for the collateral purpose of connecting the defendant with the theft. *R.* v. *Pooley*, 2 *Leach*, 900. But upon an indictment for arson, with intent to defraud an insurance company, the policy cannot be received in evidence unless it is duly stamped. *R.* v. *Gilson, R.* & *R.* 138; 2 *Leach*, 1007; 1 *Taunt.* 25. The rule upon this subject seems to be, that, where the indictment is founded on a written instrument, and the instrument itself is the crime, it is receivable in evidence without a stamp; but where the indictment is for an offence distinct from the instrument, and the instrument is only introduced collaterally, it cannot be received unless it be properly stamped. *R.* v. *Smyth*, 5 *C.* & *P.* 202. *See Coppock* v. *Bower*, 4 *M.* & *W.* 361.



## Sect. 4.

### PAROL EVIDENCE.



### 1. *In what Cases receivable.*

Parol evidence is inferior to written evidence: and as the general rule is, that the best possible evidence shall be given, it follows, of course, that parol evidence can never be received where there is written evidence of the same fact. And so strict is the rule in this respect, that where an agreement in writing on unstamped paper was designedly destroyed by one of the parties to it, it was holden that it was not open to the other party to give any evidence whatever of the matter of agreement; parol evidence could not be received of it, because it had been reduced to writing; nor could parol evidence be received of the contents of the written instrument as secondary evidence, because, if the instrument itself were produced, it could not be received in evidence for want of a stamp. *Rippiner* v. *Wright*, 2 *B & Ald.* 478: *R.* v. *Castle Morton*, 3 *B. & Ald.* 588: *and see Doe* v. *Cartwright*, *Id.* 326; *and* 2 *B. & B.* 99. But where a parol contract is made subsequently to a written contract, the latter being substituted for the former, parol evidence may, of course, be given of the latter contract. *White* v. *Parkin*, 12 *East*, 578. As to the cases in which parol evidence may be received as secondary evidence of a written instrument, where the written instrument is proved to have been burnt, destroyed, or lost, or in possession of the opposite party, *see ante, p.* 139. There are no *degrees* of parol evidence; and therefore, a party who has laid the foundation for such evidence, may prove the contents of a deed by parol, although it appear that there is an attested copy in existence. *Doe* d. *Gilbert* v. *Ross*, 7 *M. & W.* 102: *Brown* v. *Woodman*, 6 *C. & P.* 206: *Hall* v. *Ball*, 3 *Scott*, *N. R.* 577. But it has been held, that where there is a copy of the original document, it cannot be proved by a copy of that copy. *Liebman* v. *Pooley*, 2 *Stark. R.* 167: *Everingham* v. *Roundell*, 2 *Moo. & Rob.* 138.

*Secondly*. It is a general rule, that parol evidence shall not be received of anything which is not immediately within the knowledge of the witness; he must speak of facts which happened in his presence, or within his hearing. To this, however, there is one exception, namely, that in a matter of science, a person intimately acquainted with it may be called upon to give his opinion as to the probable result or consequence from certain facts already proved. As, for instance, if it were required to determine whether a man died of any particular disease, symptoms being proved, a physician may be called upon to give in evidence his opinion as to the disease of which the party died, as founded upon the symptoms so proved, although he have never seen the deceased. So, upon an indictment

for murder, the deceased's wounds, &c. being described, a surgeon may be called upon to give in evidence his opinion whether the deceased died in consequence of his wounds, or from natural causes. Upon a question of insanity, a witness of medical skill may be asked whether such and such appearances, proved by other witnesses, are, in his judgment, symptoms of insanity; but it is very doubtful whether he can be asked, if, from the testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity, which is the very point to be decided by the jury. *R.* v. *Wright, R. & R.* 456. On an indictment for uttering a forged will, which, it was suggested, had been written over pencil marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror and traced the pencil marks, was admissible on the part of the prosecution. *Reg.* v. *Thomas Williams,* 8 *C. & P.* 434.

*Thirdly.* We have seen, (*ante, p.* 113), that hearsay is no evidence, excepting in certain excepted cases before mentioned. But, in other cases, all facts which cannot be proved by records, or other written evidence, may be proved by parol evidence.

## 2. *Incompetency of Witnesses.*

Persons deemed incompetent as witnesses, and who, (before the recent statute, 6 & 7 *Vict. c.* 85, *post, p.* 144), were therefore not to be allowed to give evidence upon a criminal prosecution, may be classed as follows:—those who do not appear to have sufficient discretion; those who do not appear to have a right sense of the sanctity and moral obligation of an oath; those whose crimes had rendered them infamous; those who were interested in the event of the suit; those who stand in the relation of husband or wife to the defendant; and, lastly, the counsel and solicitors of the defendant and prosecutor, in some instances.

*From Want of Discretion.*]—An idiot shall not be allowed to give evidence; *Co. Lit.* 6. *b.; Gilb. Ev.* 144; nor a lunatic, *Co. Lit.* 6. *b.; Gilb. Ev.* 144, unless during a lucid interval; *Com. Dig. Testm.* (A 1); nor a person who is deaf, dumb, and blind. But a person who is deaf and dumb merely, is not incompetent; and he may be examined through the medium of a sworn interpreter, who understands his signs. *R.* v. *Ruston,* 1 *Leach,* 408: *R.* v. *Pollock, MS.* 1815: 1 *Phil. Ev.* 18, 20. So, an infant of any age may be a witness, provided such infant appear sufficiently to understand the nature and moral obligation of an oath; for its competency depends not upon its age but its understanding. *R.* v. *Powell,* 1 *Leach,* 110: *R.* v. *Brazier, Id.* 199: *R.* v. *Williams,* 7 *C. & P.* 320. *See* 2 *Hale,* 278, 284; *Com. Dig. Testm.* (A 1); *R.* v. *Travers,* 2 *Str.* 700; *Gilb. Ev.* 144.

*From Want of Religion.*]—It is not necessary that a witness should be a Christian, or even believe in the Old Testament, (as laid down in some of the older authorities; *see Co. Lit.* 6. *b.; Gilb. Ev.* 142, 143), in order to render him competent; it is sufficient if he believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. *Omichund* v. *Barker, Willes,* 538; 1 *Atk.* 19, 21; 1 *Wils.* 84: *Bull. N. P.* 292; *R.* v.

*Taylor*, *Peake*, 11. Thus, Christians of all sects and denominations, *see R.* v. *Maldrone*, *Leach*, 412; *Peake*, 11, 23, 155; Jews, *Gilb. Ev.* 143; 2 *Str.* 821; Turks, Moors, and other Mussulmen, *see* 2 *Str.* 1104; Gentoos, *Willes*, 538; 1 *Atk.* 19, 21; 1 *Wils.* 84; Chinese, *C. & Mar.* 248, and the like, may be witnesses. But a man wholly without religion, and having no belief in the moral obligation of an oath, shall not be received to give evidence in any case whatever. 1 *Atk.* 44.

The circumstance that a principal witness, although an adult, and of sufficient intellect, has no idea of a future state of rewards and punishments, is not a sufficient ground for discharging the jury, though this appears as soon as the jury is charged, and before any evidence is given. *R.* v. *Wade*, 1 *Mood. C. C.* 86.

*From Infamy.*]—Before the passing of the statute 6 & 7 *Vict. c.* 85, persons convicted of treason, felony, piracy, *præmunire*, perjury, forgery, 2 *Hawk. c.* 46, *s.* 19; *Gilb. Ev.* 139; 2 *Roll. Abr.* 616; *Co. Lit.* 6; or any other species of the *crimen falsi*, such as conspiracy, barratry, and the like; *R.* v. *Priddle*, 1 *Leach*, 442: *R.* v. *Ford*, 2 *Salk.* 690: *see Bushell* v. *Barrott*, *Ry. & M. N. P.* 434, were not allowed to give evidence. Formerly it was the general opinion, that standing in the pillory for any offence, or undergoing any other species of infamous corporal punishment, incapacitated a man from being a witness; 2 *Hawk. c.* 46, *s.* 19; *Co. Lit.* 6. *b.*; *R.* v. *Carter*, 5 *Mod.* 74; 2 *Salk.* 461, 689; but it was afterwards settled that it was the infamy of the crime, and not the nature or mode of the punishment, that destroyed the competency; *Pendock* v. *Mackinder*, 2 *Wils.* 18; *Gilb. Ev.* 140; and therefore, though a man had stood in the pillory for a libel, or for seditious words, or the like, he was not thereby disabled from being a witness. *Gilb. Ev.* 140, 141; 3 *Lev.* 426. So, outlawry in a civil suit did not render a man incompetent as a witness. *Co. Lit.* 6. *b.*; 2 *Hawk. c.* 46, *s.* 21; nor a conviction for keeping a gaming-house; *R.* v. *Grant*, *Ry. & M. N. P.* 270. Nor had the mere commission of any offence that effect, unless the party had been actually convicted of it. *Kel.* 17, 18; 1 *Sid.* 51; *Cowp.* 3. *See* 11 *East*, 309.

A pardon, also, of any of these offences, had the effect of restoring competency, in as full a manner as if the witness had never been convicted; 2 *Hawk. c.* 46, *s*, 22; *Gilb. Ev.* 141, 142; except in two cases only, viz. perjury on the stat. 5 *El. c.* 9, and conspiracy at the suit of the Queen; *R.* v. *Guisse*, 1 *Ld. Raym.* 257; *R.* v. *Ford*, 2 *Salk.* 690; 2 *Hawk. c.* 46, *s.* 22: and so had the endurance of the punishment, upon a conviction for any felony not capital, or for any misdemeanor, except perjury and subornation of perjury. 6 *G.* 4, *c.* 25, *s.* 2; 9 *G.* 4, c. 32, *ss.* 3, 4.

But now, by the stat. 6 & 7 *Vict. c.* 85, *s.* 1, no person offered as a witness shall be excluded by reason of incapacity from crime or interest from giving evidence, either in person, or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation, in those cases wherein affirmation is by law receivable, notwithstanding that such

person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence.

*From Interest.*]—It was also a general rule of evidence, before the stat. 5 & 7 *Vict. c.* 85, not to admit the testimony of a witness who was necessarily to be a gainer or loser by the event of the cause, whether such advantage were direct and immediate, or consequential only. *Co. Litt.* 6; *Gilb. Ev.* 19. *See* 1 *Sid.* 237; 2 *Atk.* 615; *Hardw.* 258; 4 *Burr.* 2251; 3 *T. R.* 27; 7 *T. R.*; 9 *B. & C.* 549.

There were several exceptions, however, to this rule, in criminal cases. *First.* A person entitled to a reward upon the conviction of the defendant was not thereby rendered incompetent to give evidence against him. *R.* v. *Muscot,* 10 *Mod.* 193, whether the reward were given by statute, by proclamation, or by a private person. 1 *Ph. Ev.* 119, 127.

*Secondly.* Where the penalty for an offence was given by statute to the poor of a parish or place, an inhabitant of that parish or place was a competent witness to prove the offence, if the penalty did not exceed 20*l.*, notwithstanding that the parish or place might be benefited by the conviction. 27 *G.* 3, *c.* 29. So, upon an indictment for not repairing a bridge or highway thereunto belonging, an inhabitant of the county or parish respectively might be a witness, although the county or parish might be benefited by his testimony. 1 *Anne, st.* 1, *c.* 18, *s.* 13; *see* 15 *East,* 474; 1 *B. & Ald.* 66. But this statute applied only to indictments or informations against parties liable to repair bridges and the highways thereto belonging, and not to indictments for the non-repair of highways generally. Upon an indictment for the non-repair of a highway, inhabitants rated, or liable to be rated, have been held incompetent witnesses; and the stat. 54 *G.* 3, *c.* 170, *s.* 9, did not render them competent. *Oxenden* v. *Palmer,* 2 *B. & Ad.* 236: *R.* v. *Bishop Auckland,* 1 *M. & Rob.* 286; 1 *Ad. & Ell.* 744. But see now the 5 & 6 *W.* 4, *c.* 50, *s.* 100, (*post, B. II, C. V, S. II*). And by the stat. 3 & 4 *Vict. c.* 26, *s.* 1, it was enacted, that no person called as a witness on any trial, in any court whatever, should be disabled or prevented from giving evidence by reason only of his being, as the inhabitant of any parish or township, rated or assessed, or liable to be rated or assessed, to the relief of the poor, or for or towards the maintenance of church, chapel, or highways, or for any other person whatsoever.

*Thirdly.* The prosecutor was in all cases a competent witness to prove the offence, *Peake, Ev.* 153—155: *see Gilb. Ev.* 123, even although he entitle himself to the restoration of his stolen goods by the conviction, *R.* v. *Muscot,* 10 *Mod.* 193, or entitle himself to costs by the conviction, where the indictment has been removed by *certiorari. Ib.* Upon an indictment for perjury, the party injured by the perjury was a competent witness to prove it; for he could not afterwards avail himself of the conviction in any civil suit, either at law or in equity. *R.* v. *Boston,* 4 *East,* 572; *and see Id.* 572, *n.*; 1 *Taunt.* 520: *R.* v. *Dalby, Peake, N. P. C.* 12: *R.* v. *Eden,* 1 *Esp.* 97: *R.* v. *Hulme,* 7 *C. & P.* 8. *See Reg.* v. *Keat,* 2 *Mood. C. C.* 24: *Reg.* v. *Yates, C. & Mar.* 132. Forgery, indeed, was the only criminal case in which the party injured was not a competent witness to prove the offence, the person whose name was forged being deemed

incompetent as a witness to prove the forgery. *Gilb. Ev.* 124; *R.* v. *Rhodes*, 2 *Str.* 728: *R.* v. *Caffy*, 2 *East*, *P. C.* 995: *R.* v. *Taylor*, 1 *Leach*, 214: *R.* v. *Boston*, 4 *East*, 582, *per Lord Ellenborough*, C. J. This rule seems to have been originally adopted upon the erroneous supposition that the witness would be discharging himself of his liability by the conviction, and that the record of conviction might be given in evidence for him in an action upon the forged instrument; and we accordingly find that, in cases where this reason does not apply, the person whose name was forged has been admitted as a competent witness. *See R.* v. *Newland*, 1 *Leach*, 311: *R.* v. *Sponsonby*, *Id.* 332: *R.* v. *Wait*, 1 *Bing.* 121; *R.* & *R.* 507: *R.* v. *Peacock*, *R.* & *R.* 278: *R.* v. *Mott*, *Id.* 435. But by stat. 9 *G.* 4, *c.* 32, *s.* 2, it was enacted, that no person should be deemed an incompetent witness in support of a prosecution for forgery, or uttering forged instruments, by reason of any interest which he might have, or be supposed to have, in the instrument forged.

*Fourthly.* An accomplice was always a competent witness, although his expectation of pardon depended upon the defendant's conviction. *Gilb. Ev.* 136; 1 *Hale*, 303; 2 *Hawk. c.* 46, *s.* 94. *See Say.* 289; *Mead* v. *Robinson*, *Willes*, 423. So, an accessary is a competent witness against his principal, and the principal against the accessary; as, for instance, upon an indictment for receiving stolen goods, the person who stole the goods is a competent witness. *R.* v. *Patram*, 2 *East*, 782: *R.* v. *Haslom*, 1 *Leach*, 467. But the fact of the witness's being an accomplice, accessary, or principal, detracts very materially from his credit; *Gilb. Ev.* 136; and it is always considered necessary, (although in strict law it is not essential, *see R.* v. *Hastings*, 7 *C.* & *P.* 152), in order to induce the jury to credit his testimony, to give other evidence confirmatory of, at least, some of the leading circumstances of his story, from which the jury may be able to presume that he has told the truth as to the rest. *See Cowp.* 336. If, upon an indictment against several, the accomplice be confirmed in the testimony he gives against some of the prisoners, but not as to the others, still this has been holden sufficient confirmation to warrant the conviction of all. *R.* v. *Dawber*, 3 *Stark.* 43, & *n.* *And see R.* v. *Jones*, 2 *Camp.* 131. And it has been said, that if an accomplice be confirmed as to the particulars of the story, he does not require confirmation as to the person charged; *R.* v. *Birkett*, *R.* & *R.* 252; but this doctrine has been rejected in late cases; inasmuch as the confirmation as to the circumstances proves only that the accomplice was participant in the felony, not that the particular party charged was his confederate. *R.* v. *Webb*, 6 *C.* & *P.* 595: *R.* v. *Wilkes*, 7 *C.* & *P.* 172: *R.* v. *Farler*, 8 *C.* & *P.* 107: *Reg.* v. *Dyke*, *Id.* 261: *Reg.* v. *Birkett*, *Id.* 732. And where, upon an indictment against principal and accessaries, the case against the principal was proved by an accomplice, who was confirmed as to the accessaries, but not as to the principal, the jury were directed to acquit the prisoners. *R.* v. *Wells*, *Moo.* & *M.* 236: *R.* v. *Moores*, 7 *C.* & *P.* 270. Nor ought a prisoner to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. *R.* v. *Noakes*, 5 *C.* & *P.* 236. The testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of his statement. *R.* v. *Neal*, 7 *C.* & *P.* 168. A prisoner who employed another person to harbour a principal felon was convicted on the uncorroborated testimony of the person who actually harboured him. *R.* v. *Jarvis*, 2 *M.* & *Rob.* 40.

And now, as we have seen, the stat. 6 & 7 *Vict. c.* 85, *s.* 1, renders all persons competent as witnesses, notwithstanding they may have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, whether civil or criminal, in which they may be offered as witnesses; subject, however, to certain exceptions, which will be presently stated.

*From being Parties to the Suit.*]—In civil actions, neither party shall be allowed to give evidence for, or be obliged to give evidence against, himself. In criminal cases, the rule is the same; but it is not applicable to the prosecutor, for the indictment, &c., is at the suit not of the prosecutor, but of the Queen; and the prosecutor is accordingly deemed a competent witness in all cases. (*See ante, p.* 145). The defendant, so far from being obliged to give evidence against himself, is not bound even to answer the questions put to him upon his examination before a magistrate. And the defendant's wife cannot be compelled, nor indeed will she be permitted, to give evidence against her husband, excepting in some instances, where she is also the prosecutrix. (*Vide infrà.*) And by the 6 & 7 *Vict. c.* 85, *s.* 1, it is expressly provided, that that act shall not render competent any party to any suit, action, or proceeding individually cnamed in the record, or the husband or wife of such person. It sometimes happens, however, that the prosecutor, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against both jointly; if, therefore, in such a case, no evidence whatever be given to affect the person thus unjustly made a defendant, the judge in his discretion, *Davis* v. *Living, Holt, N. P.* 275, may direct the jury to acquit him in the first instance, so as to give an opportunity to the other defendant to avail himself of his testimony. *Gilb. Ev.* 131, 132; *Bull. N. P.* 285; 1 *Fost.* 313, *n.*: *Reg.* v. *Owen*, 9 *C. & P.* 83. *See the* 3 & 4 *Vict. c.* 26, *s.* 2.

*From Relation to the Parties.*]—It is a general rule of evidence that husband and wife cannot be witnesses either for or against each other; *Co. Litt.* 6. *b.*; *Gilb. Ev.* 133, 134; *Davis* v. *Dinwoody*, 4 *T. R.* 678; 2 *T. R.* 263; *Hardw.* 264; *Bac. Abr., Evidence*, (*A.* 1): *see* 1 *Str.* 504; nor against any other person indicted jointly with the husband or wife; *R.* v. *Smith*, 1 *Mood. C. C.* 289; and it is doubtful if this rule do not extend to the case of a woman cohabiting with a man and passing as his wife. *See Campbell* v. *Twemlow*, 1 *Price*, 81. Where several were indicted for a conspiracy, Lord *Ellenborough* refused to allow the wife of one of them to give evidence in favour of some of the others; for, if all the others were acquitted, the husband must consequently have been acquitted also. *R.* v. *Locker*, 5 *Esp.* 107: *and see R.* v. *Frederick*, 2 *Str.* 1094. So, in conspiracy, the wife of one of the defendants should not be allowed to give evidence against any of the others, as to any act done by him in furtherance of the common design, particularly after evidence given connecting the husband with that defendant in the general conspiracy. *R.* v. *Sergeant*, *R. & M. N. P.* 352. So, a married woman cannot be called to prove a conversation between the prisoner and her husband, which goes to shew that her husband and the prisoner committed the felony for which the prisoner is tried. *R.* v. *Gleed, Harrison's Dig.* 849. But the wife of a person already

convicted for the same offence is a competent witness against the prisoner. *Reg.* v. *M. Williams*, 8 *C. & P.* 284. *See the* 6 *&* 7 *Vict. c.* 85, *s.* 1, *supra.*

To the rule above laid down, however, there are several exceptions, namely, *First*, in cases of high treason, husband and wife may be witnesses against each other. *R.* v. *Griggs*, *T. Raym.* 1; *but see* 1 *Br. & Gold.* 47; *Co. Litt.* 66; 1 *Hale*, 301, *cont.*: *and see* 1 *Hale*, 48, *dub.* *Secondly*, when the husband is indicted for a personal injury to the wife, the latter is a competent witness to support the prosecution; *Bull. N. P.* 286; 1 *Hale*, 301; and the same, when the wife is indicted for a personal injury to the husband. Where a husband was indicted for being present, aiding and assisting another in committing a rape upon his own wife, the wife was holden to be a competent witness to prove the offence; *R.* v. *Audley*, 1 *St. Tr.* 393; and the same where a husband was indicted for the battery of his wife. *R.* v. *Azye*, 1 *Str.* 635. So, upon an indictment against a man for the murder of his wife, the dying declarations of the wife were allowed to be given in evidence against him. *R.* v. *Woodcock*, 2 *Leach*, 563: *R.* v. *John*, 1 *East*, *P. C.* 357. *Thirdly*, upon an indictment for bigamy, the second wife is a competent witness against the defendant, the first marriage being previously proved; for the second marriage is void. 1 *Hale*, 393. So, upon an indictment for forcible abduction and marriage, the woman is a competent witness against the defendant; for a contract obtained by force has no obligation in law. *Bull. N. P.* 286; 1 *Hale*, 302; *R.* v. *Wakefield*, *publ. by Murray*, 257. These last, however, are not really exceptions to the rule above mentioned; for here the woman is not, in law, the wife of the defendant.

A father or mother may be a witness for or against the child; *R.* v. *Mayor of Oakhampton*, 1 *Wils.* 332; 2 *T. R.* 263; 6 *T. R.* 330; *Hardw.* 277; 1 *Salk.* 289; 2 *Str.* 925, 940; *Cowp.* 591; a child, for or against the father or mother; *Gilb. Ev.* 135; a servant, for or against the master or mistress; *Id.*; a master or mistress, for or against the servant.

Counsel, solicitors, and attornies, are privileged from giving (indeed they will not be permitted to give) evidence of any matters confided to them by their clients in their professional capacity, *Gilb. Ev.* 136; *Wilson* v. *Rastall*, 4 *T. R.* 753: *and see* 2 *Camp.* 9; 6 *Mad.* 47; 2 *Stark.* 274; 2 *B. & P.* 4; 2 *B. & C.* 743; *Ry. & M. N. P.* 34, either in the cause respecting which the communication was made, or in any other; 4 *T. R*, 753; and whether the client be a party to the cause or not; 2 *Camp.* 578; or whether the business on which the attorney was retained had reference to legal proceedings, either existing or in contemplation, or not; *Greenough* v. *Gaskell*, 1 *Myl. & K.* 98: *see* 1 *M. & Rob.* 326; 4 *B. & Ad.* 871; 1 *Mee. & W.* 533; 2 *Mee. & W.* 98. So, an attorney is not bound, on a *subpœna duces tecum*, to produce any deeds or papers belonging to his client in his custody, if it appear that the production will operate to the prejudice of his client. *Copeland* v. *Watts*, 1 *Stark. N. P.* 95. If, however, being attorney for the defendant, he hold papers in another capacity, he must produce them; as, for instance, an attorney and steward of a lord of a borough is bound to produce public documents relating to the borough, but he is not bound to produce documents relating to the lord's interest in the borough. *R.* v. *Woodley*, 1 *M. & Rob.* 390.

What is here said as to attornies is equally applicable to their agents, *Parkins* v. *Hawkshaw*, 2 *Stark*. 239, and their clerks, *Taylor* v. *Foster*, 2 *C. & P.* 195 : *see Webb* v. *Smith*, *Id.* 337, and to persons employed by them as interpreters between them and their clients. *Du Bonne* v. *Lavette*, *Peake*, 78. This privilege, however, is to be considered as excluding the disclosure merely of such facts as have been communicated confidentially by the client to the attorney, &c., in his professional capacity, and therefore does not extend to facts known to the attorney previously to his retainer; *Gilb. Ev.* 136; *Cutts* v. *Pickering*, 1 *Vent.* 197; *Skin.* 404; nor to the contents of a notice served upon him by the attorney on the other side, requiring him to produce at the trial a certain paper belonging to his client in his hands, *Spenceley* v. *Schulenburgh*, 7 *East*, 357, or the like. And where an attorney was present at the time his client swore to an answer in Chancery, it was holden that he could be compelled to give evidence of that fact, on an indictment against his client for perjury. *Bull. N. P.* 284; *but see* 2 *Str.* 1122, *cont.* So, he may be called to prove his client's handwriting, though the knowledge was obtained from witnessing his execution of a bail bond in the action; *Hurd* v. *Moring*, 1 *C. & P.* 372; and he may be called to prove his client's identity. *Studly* v. *Saunders*, 2 *D. & R.* 347 : *Parkins* v. *Hawkshaw*, 2 *Stark. N. P.* 239, *cont.* And if he be a subscribing witness to a deed, he may be examined to the execution. *Doe* v. *Andrews*, *Cowp.* 846 : *Robson* v. *Kemp*, 4 *Esp.* 235; 5 *Esp.* 52. This privilege also is strictly confined to counsel, solicitors, attornies, and their agents, &c. *See Foote* v. *Hayne*, *Ry. & M. N. P.* 1[illegible]. It does not extend to the steward or other agent of the party, 2 *Atk.* 524; *Wilson* v. *Rastall*, 4 *T. R.* 753; or to a conveyancer, 2 *Atk.* 525, or to a physician or other medical person, 11 *St. Tr.* 243; 4 *T. R.* 753, however confidential the communications to such persons may be.

Where also the disclosure of a particular fact, not bearing directly upon the matter in question, may be of detriment to the public service, the court will not compel a witness to disclose it. As, for instance, in *Hardy's case*, 24 *How. St. Tr.* 753, a witness who was employed to obtain information of the proceedings at a meeting of one of the corresponding societies was not allowed to disclose the name of his employer. *See Home* v. *Bentinck*, 2 *B. & B.* 162 : *R.* v. *Watson*, 2 *Stark.* 136.

### 3. *Credit of Witnesses.*

The credibility of a witness is compounded of his knowledge of the facts he testifies—his disinterestedness—his integrity—his veracity—and his being bound to speak the truth, by such an oath as he deems obligatory. Proportioned to these, is the degree of credit his testimony deserves from the court and jury.

*From their Knowledge.*]—Although a witness be perfectly disinterested, although he be a man of integrity and veracity, and have a just sense of the moral obligation of the oath he has taken, still the degree of credit to be given to his testimony depends upon his real knowledge of the facts he testifies. A man may be deceived in a fact, from deriving his knowledge of it through a false medium; from his attention being occupied more by the circumstances accompanying it than by the fact itself, at the time of its occurrence; or from a thou-

sand other circumstances, which, if candidly stated, might be satisfactorily answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake. Where there is a doubt, therefore, whether the evidence given by a witness be not founded in some misconception, it is the duty of the counsel who cross-examines him, to question him as to the sources of his knowledge; his reasons for believing the fact to be as he has stated; his reasons for recollecting it; the circumstances attending its occurrence; whether it was light or dark, and whether he was near or distant, at the time it occurred, and the like; so that the jury may be able to judge of the degree of confidence they should place in the witness's testimony. If a witness refuse to answer such questions, or do not answer them satisfactorily, it should have the effect of detracting considerably from his credit in the estimation of the jury.

*From their Disinterestedness.*]—A witness, to be perfectly credible, must not be, in the slightest degree, biassed or partial to one party or the other. Therefore, if it appear that the witness is prejudiced against the party against whom he appears, or has before expressed sentiments indicative of such prejudice, or if it appear that a prosecution is pending against him for the same or a similar offence, and he come to disprove some of the facts charged in the indictment against the defendant—all these are circumstances which detract proportionably from his credit. In cases where the defendant is not obliged to appear personally at the trial, as in the case of informations and of indictments in the Court of King's Bench, the witness's being liable as one of the defendant's bail, not merely goes to his credit, but seems to be an objection even to his competency; at least such is the case in civil actions. Where the prosecutor is to derive an advantage from a conviction of the defendant, this, we have seen, (*ante, p.* 145), is no objection to his competency; it goes to his credit merely. A father is a competent witness for his son, and a son for his father; but the interest arising from the relationship detracts proportionably from the credit of the witness. *See* 2 *Hale,* 276; *Gilb. Ev.* 149, 155.

The defendant may be cross-examined as to his being interested; *see Doxon* v. *Haigh,* 1 *Esp.* 409; and indeed it may be doubted whether you would be allowed to prove his interest in any other way, until you had first cross-examined him upon the subject. If he acknowledge that he was once interested, he will be allowed afterwards to prove that his interest has determined, without producing the instrument by which his interest was so determined. *Butchers' Co.* v. *Jones,* 1 *Esp.* 160: *Botham* v. *Swingler, Id.* 164. *See* 2 *Stark. N. P.* 433; 2 *Camp.* 14; *M. & M.* 321, *n.*; 1 *C. & P.* 234; 2 *Per. & D.* 538. But if his interest have been proved by other witnesses, the instrument which has determined it must be produced.

*From their Integrity.*]—Even before the stat. 6 & 7 *Vict. c.* 85, it was only a *conviction* for treason, felony, &c., as we have seen, (*ante, p.* 144), that rendered a witness incompetent; the *commission* alone of any of the offences there mentioned, without conviction, (*see R.* v. *Teal,* 11 *East,* 309), and the commission of all other offences which import falsity or fraud, whether followed up by conviction or not, affected only the credit of the witness. Since that statute, the con-

viction of the witness for any crime whatever can only have the like effect. And whether he has been convicted or not, you may call witnesses to speak as to his general character, although not as to any particular offence of which he may be guilty. 2 *Hawk. c.* 46, *s.* 2; 4 *St. Tr.* 693; *R.* v. *Watson*, 2 *Stark.* 149. As to cross-examining the witness himself upon the subject of any offence imputed to him, there seems to be a difference of opinion among the judges upon the point: some hold that you cannot ask a question of a witness, the answer to which in the affirmative would subject him to punishment; others that you may ask the question, but that the witness is not bound to answer it; and others, I believe, include in the rule, not only questions, the answers to which might subject the witness to punishment, but also all those where the witness, by his answer, might be obliged to allege his own infamy or turpitude, although they might not subject him to any punishment. *See the cases collected*, 2 *Russ.* 626 *et seq.* In *R.* v. *Holding*, Old Bailey, June 1821, *Bayley*, J., held that a witness may be asked a question, the answer to which may subject him to punishment, but he is not compellable to answer it; and in *R.* v. *Slaney*, 5 *C. & P.* 213, Lord *Tenterden* said, that a witness would not be compelled to answer a question which would *tend* to criminate him. All other questions, for the purpose of impeaching a witness's character, may not only be put, but must be answered. *See Cundell* v. *Pratt*, 1 *Moo. & M.* 108. And a witness cannot refuse to produce a document kept by him under the authority of an act of Parliament, on the ground that it may criminate himself. *Bradshaw* v. *Murphy*, 7 *C. & P.* 612. If the witness be examined as to the offence imputed to him, and deny it, such denial is conclusive, and you cannot afterwards call witnesses or offer other evidence to contradict him. *R.* v. *Watson*, 2 *Stark.* 149 *et seq.*: *Harris* v. *Tippett*, 2 *Camp.* 627. Or if general evidence be given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinion, if he think it prudent to do so; or he may call witnesses who can speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination. Where a witness refuses to answer a question, his not answering ought not, legally, to have any effect with the jury. *R.* v. *Watson*, 2 *Stark.* 157: *Rose* v. *Blakemore*, *Ry. & M. N. P.* 382: *Lloyd* v. *Passingham*, 16 *Ves.* 84.

In *The Queen's case*, it was holden, that where a witness for a prosecution has been examined in chief, the defendant cannot afterwards give evidence of any declaration by such witness, or of acts done by him, to procure persons corruptly to give evidence in support of the prosecution, unless he have previously cross-examined such witness as to such declarations or acts. 2 *B. & B.* 311.

*From their Veracity.*]—The character of a witness for habitual veracity is an essential ingredient in his credibility; a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appear that he has formerly said or written the contrary of that which he has now sworn, (unless the reason of his having done so be very satisfactorily accounted for), his evidence should not have much weight with a jury; and if he have formerly sworn the contrary,

that fact, (although no objection to his competency, *R.* v. *Teal,* 11 *East,* 309), is almost conclusive against his credibility. In strictness, you cannot ask a witness if at a former trial he swore differently from what he is now swearing; but you should give in evidence an examined copy of the record of the former trial, or at least the *nisi prius* record, (if the cause have been tried at *Nisi Prius*), *Fisher* v. *Kitchingman, Barnes,* 449: *Foster* v. *Compton,* 2 *Stark.* 364, and then prove what the witness swore at that trial, either by having it read from the judge's notes, or proved upon oath from the notes or recollection of any person who was present at the time. *Mayor of Doncaster* v. *Day,* 3 *Taunt.* 262; *Gilb. Ev.* 68, 69. Or, if the former declaration of the witness were not made by him as witness in a cause, yet if it were in writing, it is irregular to question him as to the contents of it; you should produce it, ask him if it be his handwriting, and then give it in evidence. In *The Queen's case,* it was holden, that in cross-examining a witness you cannot state to him the contents of a letter, and then ask him if he ever wrote such a letter; but you should shew him the letter, ask him if it be of his handwriting, and if he admit it, then give the letter in evidence. Or you may shew him part of the letter, and ask him if he wrote that part; but if he do not admit that he wrote it, you cannot then proceed to cross-examine him as to the contents of the letter; *The Queen's case,* 2 *B.* & *B.* 286; nor, even if he admit it to be his handwriting, can you question him whether statements, such as you suggest to him, are contained in the letter; but the entire letter must be given in evidence. *Id.* 288.

After the passing of the act of 6 & 7 *W.* 4, c. 114, whereby all persons tried for felonies are admitted to make full answer and defence to the case for the prosecution by counsel or attorney, the judges held a conference as to the course of practice which it would be most advisable to adopt in consequence, and came to the following conclusions: *see* 7 *C* & *P.* 676: I. That where a witness for the Crown has made a deposition before a magistrate, he cannot, on his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel. II. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it. III. That the witness cannot, in cross-examination, be compelled to answer whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event, the counsel for the prisoner may proceed with his cross-examination; and, if the witness admits such statement to have been made, he may comment

upon such omission, or upon the effect of it upon the other part of his testimony; or, if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

These resolutions are binding on the prisoner's counsel; but it seems that the judge who tries a case may, notwithstanding, if he think fit, himself look at the depositions, and question a witness as to any discrepancy which appears between his deposition and his evidence; whether—if he does so, and thereby introduces new facts in evidence—that will give the counsel for the prosecution the right of reply, is not settled. *See R.* v. *Edwards*, 8 *C. & P.* 26. The witness cannot be asked whether he did or did not state a particular fact before the magistrate, without first allowing him to read, or have read to him, his deposition. *Reg.* v. *Taylor*, 8 *C. & P.* 726. Where an accomplice who could not read gave evidence falling very short of what he had stated before the magistrate, the judge allowed his deposition, signed with his mark, to be shewn to him, but would not allow it to be read to him, in order that the prosecuting counsel might examine upon it. *Reg.* v. *Beardmore*, 8 *C. & P.* 260. If the prisoner denies his signature or mark to the deposition, it may be proved by the evidence of any competent person who heard it taken; and it is not necessary to prove it by the magistrate or his clerk, *Reg.* v. *Hallett*, 9 *C. & P.* 748: *Reg.* v. *Hearn*, 1 *C. & Mar.* 109, any more than in the case of a confession. (*See ante, p.* 119).

But if the former declaration of the witness were not in writing, but merely by parol, and not made by him as witness in a cause, in that case you may cross-examine him on the subject of it; and if he deny it, you may call another witness to prove it. So, if a witness admit that when before the magistrate he was cross-examined for the prisoner, and it appears that such cross-examination is not returned with the depositions, he may be questioned by the prisoner's counsel as to the answers he gave. *R.* v. *Edwards*, 8 *C. & P.* 25. So, if it appear that a statement of the witness before the magistrate, although written down by him, was not read over to the witness, nor signed by him or by the magistrate, the witness may be cross-examined as to such statement without producing the writing. *Reg.* v. *Griffiths*, 9 *C. & P.* 746. So, a witness may be cross-examined as to his statement before the grand jury in the same case. *Reg.* v. *Gibson*, *C. & Mar.* 672. If, however, a witness, when examined in chief as to the occurrence of a fact, answer that he does not remember it, the counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred, unless he have in cross-examination questioned the witness as to such declaration; for the fact may have occurred, and the witness have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination. *The Queen's case*, 2 *B. & B.* 299. It may be necessary also to state, as a general rule, that a witness cannot be cross-examined as to any distinct collateral fact, not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of his testimony. *Spenceley* v. *Willot*, 7 *East*, 108.

A consideration of the probability of the fact also may aid us in forming a judgment of the credit that should be given to a witness for veracity. If he tell us of a fact having occurred which is contrary to common experience and observation, it will require that his integrity, veracity, and means of knowledge should be indisputable, to induce us to believe it; but if, on the contrary, the fact stated by him be very likely to have happened, we may be induced to believe it, without very scrupulously inquiring into his character for integrity, veracity, &c. The strength of the evidence should always be great in proportion to the improbability of the fact to be established by it.

It may be necessary to observe, that if a witness called to prove a fact prove the contrary, his credit cannot be impeached by general evidence; *Ewer* v. *Ambrose*, 2 *B. & C.* 750; *Bull. N. P.* 297; but the party is at liberty to make out his case by other and contradictory evidence, for the other witnesses are not called directly to impeach the credit of the first. *Ib.*: *Reg.* v. *Ball*, 8 *C. & P.* 745. It seems, also, that it is not competent for a party to shew that his own witness has at any time given a different account of the same transaction. 3 *B. & C.* 746; *Reg.* v. *Farr*, 8 *C. & P.* 768: *Reg.* v. *Ball, supra.* In one case, however, where the judge called a witness upon the back of the indictment, who gave evidence in form against the defendant, and the judge ordered the deposition of the witness before the coroner to be read, to shew its inconsistency with the testimony then given, the twelve judges thought him right in so doing, and Lord *Ellenborough* and *Mansfield*, C. J., thought that the prosecutor had the same right. *R.* v. *Oldroyd*, *R. & R.* 88. (*See ante, p.* 153).

*From their being sworn to speak the Truth.*]—No credit whatever shall be given to the testimony of a witness, examined *vivâ voce* in a court of common law in this country, unless he have previously been sworn to speak the truth. Even a peer, who, in a court of equity, is allowed to give in his answer without oath, merely pledging his honour for the truth of it, must be sworn if examined as a witness. *W. Jones*, 153—155; *Cro. Car.* 64; 2 *Mod.* 99; 2 *Salk.* 513; 1 *P. Wms.* 146.

The form of the oath varies according to the religion or country of the witness. *See Cowp.* 382. Christians are sworn on the New Testament; Jews, on the Old Testament; Mahometans, on the Koran; and persons of other religions, according to the form prescribed for that purpose by the religion they profess. *Bull. N. P.* 292. Christians are sworn with their hats off; Jews, with their hats on. Even among the different sects of Christians, there may be a variance in the manner of taking the oath; a Scotch Covenanter, for instance, instead of kissing the book, as is done by other sects of Christians, holds up his hand, whilst the book lies open before him*. *R.* v. *Mildrone*, 1 *Leach*, 412; *Cowp.* 382: *and see Peake,*

* Scotch Covenanter's Oath: "*According to the religion you profess, and as you consider an oath binding upon your conscience, and as you shall answer to God at the great day of judgment, you shall speak the truth, the whole truth, and nothing but the truth.*" The different sects, however, have different modes of swearing; and it may be necessary, therefore, first to ascertain from the witness what form of oath, or mode of swearing, he considers binding on his conscience. See the mode of swearing a Chinese witness stated, *Reg.* v. *Entrechman*, 1 C. & Mar. 248.

28, 155. Each witness, in short, swears in the particular form prescribed by his religion: the only general rule that can be laid down upon the subject is, that the oath be such as the witness deems obligatory upon his conscience. And it is expressly declared by the stat. 1 & 2 *Vict. c.* 105, that, in all cases in which an oath may lawfully be administered, the party is bound by the oath administered, provided it have been administered in such form and with such ceremonies as he may declare to be binding; and that, in case of wilful false swearing, he may be convicted of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted. A witness may be asked, after he is sworn, whether he considers the oath he has taken obligatory upon his conscience; but, if he answer in the affirmative, his answer is conclusive, and he cannot further be asked, whether there be any other mode of swearing more binding upon his conscience than that which has been used. *The Queen's case*, 2 *B.* & *B.* 284. The more correct and proper way is to ask the witness, before he is sworn, whether he considers the oath he is about to take obligatory upon his conscience. 2 *B.* & *B.* 284. A witness, however, may be asked whether he believes in the being of a Deity, and in a future state of rewards and punishments; but he cannot be questioned as to the particular tenets of his religion. *See Peake*, 11; *R.* v. *White*, 1 *Leach*, 430.

Formerly, in civil cases, a Quaker was allowed to make an affirmation, 7 & 8 *W.* 3, *c.* 34; 22 *G.* 2, *c.* 46, *ss.* 36, 37, and a Moravian, a declaration, 22 *G.* 3, *c.* 30, instead of an oath: but it was expressly provided by those statutes, that a Quaker or Moravian should not thereby be enabled to give evidence in criminal cases, or to serve on juries, unless he were actually sworn. But now, by the late stats. 9 *G.* 4, *c.* 32, *s.* 1; 3 & 4 *W.* 4, *c.* 49, a Quaker or Moravian, required to give evidence in a criminal case, may, instead of taking an oath in the usual form, be permitted to make a solemn affirmation or declaration, in these words: "I, A. B., do solemnly, sincerely, and truly declare and affirm," &c., which has the same force and effect in all courts of justice and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form. And if any person making such affirmation or declaration shall be convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures, to which persons convicted of wilful and corrupt perjury are subject. The same rule is now, by stat. 3 & 4 *W.* 4, *c.* 82, applicable to the denomination of Christians called Separatists; and by stat. 1 & 2 *Vict. c.* 77, to any person who *shall have been* a Quaker or a Moravian; it having been held that a person formerly a Quaker, who had seceded from that sect on some points of doctrine, retaining their opinions on the unlawfulness of swearing, but refused to affirm under the forms given in the 3 & 4 *W.* 4, *c.* 49, and 3 & 4 *W.* 4, *c.* 82, was not admissible as a witness in a criminal case on making the affirmation according to the 9 *G.* 4, *c.* 32. *Reg.* v. *Doran*, 2 *Mood. C. C.* 37. See also 5 & 6 *W.* 4, *c.* 62, as to declarations in lieu of oaths before magistrates &c., in certain cases; and 8 & 9 *Vict. c.* 48, as to declarations in lieu of oaths by bankrupts before commissioners in bankruptcy.

A witness producing documents under a *subpœna duces tecum* need not be sworn, if the party who calls him does not wish to examine him. *Davis* v. *Dale, M. & M.* 514: *Perry* v. *Gibson*, 1 *Ad. & E.* 48: *Summers* v. *Moseley*, 2 *Cro. & M.* 477.

### 4. *The Number of Witnesses requisite.*

At common law, one witness was sufficient in all cases, (with the exception of perjury), both before the grand jury and at the trial. 2 *Hawk.* c. 46, s. 2; *Fost.* 233.

In high treason, two witnesses are required, both before the grand jury and at the trial; both of the witnesses to the same overt act, or one of them to one overt act, and another of them to another overt act of the same species of treason; unless the defendant shall willingly, without violence, confess the same. 7 & 8 *W.* 3, *c.* 3, *s.* 2; 1 *Ed.* 6, *c.* 12, *s.* 22; 5 & 6 *Ed.* 6, *c.* 11, *s.* 12. And if the jury do not give credit to both of the witnesses, the defendant shall be acquitted. *Per Scroggs*, C. J., *in R.* v. *Palmer*, 3 *St. Tr.* 56. But one witness is sufficient to prove a collateral fact; *Fost.* 242; as, for instance, to prove that the defendant is a natural-born subject, *R.* v. *Vaughan*, 5 *St. Tr.* 29, or the like.

In high treason, where the overt act alleged is the assassination of the King, or any direct attempt against his life or person, one witness is sufficient. 39 & 40 *G.* 3, *c.* 93.

In misprision of treason, there must be two witnesses, unless the defendant, willingly and without violence, confess the offence. 1 *Ed.* 6, *c.* 12, *s.* 22.

Upon an indictment for perjury, there must be two witnesses; one alone is not sufficient, because there is in that case only one oath against another. *R.* v. *Muscot*, 10 *Mod.* 194. But if the assignment of perjury be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this would, perhaps, be sufficient, although it does not appear as yet to have been so decided. *R.* v. *Lee*, *MS.*, 2 *Russ.* 545. Also, if the perjury consist in the defendant's having sworn contrary to what he had before sworn upon the same subject, this is not within the rule above mentioned; for the effect of the defendant's oath in the one case is neutralized by his oath in the other; and proof by one witness will, therefore, make the evidence against the defendant preponderate. *R.* v. *Knill*, 5 *B. & Ald.* 929, *n.* But the contradiction of the one oath of the defendant by the other is not enough. *R.* v. *Harris*, 5 *B. & Ald.* 926: *Reg.* v. *Wheatland*, 8 *C. & P.* 238. Where the perjury was assigned on an affidavit of the defendant that he had paid all the debts under his bankruptcy, it was held that the non-payment of *each* debt must be proved by two witnesses. *Reg.* v. *Parker*, *C. & Mar.* 639.

In all other cases one witness is sufficient.

### 5. *Process against Witnesses.*

In cases of felony, the witnesses are usually bound over by recognisance to appear at the trial and give evidence; and if they do not appear accordingly, the recognisance may be estreated, and the penalty levied. In cases of misdemeanor, also, the witnesses are often bound over in the same manner. *See* 7 *G.* 4, *c.* 64, *ss.* 2, 3, 4. A magistrate has no power to issue a warrant for the apprehension

of a person to attend to find bail for his appearance as a witness in a civil or criminal case. *Evans* v. *Rees*, 4 *P. & D.* 32; 12 *Ad. & Ell.* 55.

But in all cases where the witnesses are not so bound over, and you are not certain that they will attend voluntarily, you may compel their appearance at the trial, by *subpœna*, &c. In ordinary cases, the common *subpœna* is sufficient. It may be sued out either at the Crown Office in London, *R.* v. *Ring*, 8 *T. R.* 585, or with the clerk of the peace, or clerk of assize of the court in which the defendant is to be tried. It is sometimes more advisable to sue it out at the Crown Office, on account of the readiness with which you may proceed afterwards against the witness by attachment, in case of his non-attendance. *See the form of the subpœna*, 5 *Burn. J.*, *by Chitty*, "*Sessions*." The names of four witnesses may be inserted in one writ. *Cowp.* 846. As soon as you have obtained the writ, make out a copy of it for each witness, and serve it upon him personally, at the same time shewing him the writ. The service should be personal; for otherwise, if he disobey the *subpœna*, he cannot be proceeded against as for a contempt. *Smalt* v. *Whitmill*, 2 *Str.* 1054. And it should be served a reasonable time before the trial; *Hammond* v. *Stewart*, 1 *Str.* 510; but if the witness be in court at the time of the trial, a service of the *subpœna* ticket upon him there would perhaps be deemed sufficient, if he were subpœnaed upon the part of the defendant, *see Cowp.* 845; 1 *W. Bl.* 36, and would certainly be sufficient, if he were subpœnaed on the part of the prosecution. Indeed, in a criminal case, a person who is present in court, when called as a witness, is bound to give his evidence although he has not been subpœnaed. *R.* v. *Sadler*, 4 *C. & P.* 218.

What we have now mentioned relates to the service of a *subpœna* where the witness is in England. But by stat. 45 *G.* 3, *c.* 92, the service of a writ of *subpœna* in any one part of the United Kingdom, shall be as effectual to compel the appearance of a witness in any other part of the same, as if the *subpœna* were served in that part of the kingdom in which the defendant is required to appear; and in case of non-attendance, the court from which the *subpœna* issued may transmit a certificate thereof in the manner pointed out in the statute; and the court to which it is so transmitted may punish the party for his default, in like manner as if he had refused to appear to a *subpœna* issuing out of that court; provided it appear that a reasonable and sufficient sum of money, to defray the witness's expenses of coming, attending to give evidence, and returning, were tendered to him at the time he was served with the *subpœna*. Where the witnesses reside in India, *see stats.* 13 *G.* 3, *c.* 63, *ss.* 40, 44; 1 *W.* 4, *c.* 22; and if the witnesses upon a prosecution for any offence committed by a person in the public service reside abroad, *see stat.* 42 *G.* 3, *c.* 85. Where the *subpœna*, however, is served in England, a tender of expenses does not seem to be necessary, *R.* v. *Cook*, 1 *C. & P.* 321; 2 *Hawk. c.* 46, *s.* 173, those expenses being otherwise provided for; (*see post*, *p.* 159); yet, if the witness be so poor as not to be able to go to the assizes or sessions at his own expense, the fact of the expenses not having been tendered would probably be deemed by the court a sufficient excuse for his non-attendance.

If any person (not being the defendant) have in his possession a written instrument which may be requisite as evidence in the cause,

then, instead of the common *subpœna*, you must serve him with a *subpœna duces tecum*, commanding him to bring it with him, and produce it at the trial. *See the form*, *Tidd, Forms*, 290, *s.* 7; 1 *Sellon*, 452. It is sued out and served in the same manner as the common *subpœna*. Upon being served with this *subpœna*, the witness must attend at the trial with the instrument required, and produce it in evidence, unless he have some lawful and reasonable excuse for withholding it; of the validity of which excuse the court, and not the witness, is to judge. *Amey* v. *Long*, 9 *East*, 473: *and see* 5 *Esp.* 90. It is no excuse that the legal custody of the instrument belongs to another, if it be in the actual possession of the witness; *Ib.*: *Amey* v. *Long*, 1 *Camp.* 14, 180, *n.*; 6 *Esp.* 116: *Corsen* v. *Dubois*, 1 *Holt*, 239; but if it tend to criminate himself, *see* 1 *Esp.* 105, or his client, (if the witness be an attorney), 4 *Burr.* 163?; (*see ante*, *p.* 148), or if it be his title-deed, *Pickering* v. *Noyes*, 2 *Dowl.* & *Ryl.* 386; 1 *B.* & *C.* 263: *R.* v. *Hunter*, 3 *C.* & *P.* 591, the court will not compel him to produce it. If the witness, instead of bringing the papers, &c. required, deliver them to the opposite party, by whom they are withheld, the court will allow secondary evidence of the contents of them to be given, without a notice to produce the originals. *Leeds* v. *Cook*, 4 *Esp.* 256. A witness so producing documents need not be sworn. (*See ante*, *p.* 155).

If the witness be in custody at the time of the trial, the only way of bringing him into court to give evidence is by *habeas corpus ad testificandum*. This writ is obtained upon motion in court, or application to a judge at chambers, founded upon an affidavit, stating that he is a material witness, and willing to attend. *See R.* v. *Layer*, 8 *Mod.* 86: *see the form*, *Tidd*, *Forms*, 290, *s.* 8; 1 *Sellon*, 452. The court will thereupon make a rule, or the judge will grant his *fiat* for the writ. *Ingross the writ, see the form, Tidd, Forms*, 290, *s.* 10, *and get a judge's name indorsed on it, Cowp.* 672. *It must be directed to the officer in whose custody the witness is. As soon as you get the writ signed, &c., leave it with the officer to whom it is directed; pay or tender to him his reasonable charges for bringing up the witness, and he will bring him into court on the day of trial, according to the exigency of the writ.* A prisoner in execution may now be brought up in this manner to give evidence, *Geery* v. *Hopkins*, 2 *Ld. Raym.* 151: *R.* v. *Burbage*, 3 *Burr.* 1440, although it was formerly holden otherwise. *Barnes*, 222; *Comb.* 17, 48. So, a sailor on board a king's ship may be brought up by this writ, if he have been previously subpœnaed, and be willing to attend. *R.* v. *Roedam*, *Cowp.* 672. But the court will not grant the writ to bring up a prisoner of war; the proper way of proceeding in that case is by application to the Secretary of State. *Furley* v. *Newham*, *Doug.* 420. So, where the application appeared to be a mere contrivance to remove a prisoner in execution, the court refused to grant it. *R.* v. *Burbage*, 3 *Burr.* 1440. By stat. 44 *G.* 3, *c.* 102, the judges of the Court of King's Bench or Common Pleas, or the barons of the Exchequer, or justices of oyer and terminer or gaol delivery, (being such judge or baron), may award writs of *habeas corpus* for bringing a prisoner detained in any gaol or prison before any of the said courts, or before any sitting of Nisi Prius, or before any other court of record, to be there examined as a witness before the grand, petit, or other jury, in all causes civil or criminal.

*Privilege of Witnesses from Arrest.*]—A person subpœnaed as a witness, or bound over by recognisance, either to prosecute or give evidence, enjoys a privilege from arrest whilst attending the court, not only on the day mentioned in the *subpœna &c.*, but also on every day of the same sittings, assizes, or sessions, until the cause is tried; he is also privileged in like manner during a reasonable time before and after the trial, whilst coming to or returning from the place where the sittings, assizes, or sessions are held. *See* 1 *H. Bl.* 636; 2 *Bl.* 1113; 8 *T. R.* 536. And this privilege has also been holden to extend to witnesses attending voluntarily, and not subpœnaed. *See Meekins* v. *Smith*, 1 *H. Bl.* 636. If a witness, under these circumstances, be arrested, the court out of which the *subpœna* issued, or the judge of the court in which the cause has been or is to be tried, will, upon application, order him to be discharged. *See* 3 *Stark. Rep.* 132.

*Penalty for Non-attendance.*]—Where a *subpœna*, sued out at the Crown Office, has been served upon the witness, and he wilfully neglects to attend at the sessions or assizes, &c., in obedience to it, the Court of Queen's Bench, upon application, will grant an attachment against him, *R.* v. *Ring*, 8 *T. R.* 585, provided the witness were served personally with the *subpœna*, *Smalt* v. *Whitmill*, 2 *Str.* 1054: *Wakefield's case*, *Hardr.* 313, and were served a reasonable time before the trial; *Hammond* v. *Stewart*, 1 *Str.* 510: *and see* 1 *Marshall*, 410; and this, whether the cause were in fact called on or not, if it satisfactorily appear that the witness would not have been forthcoming when called on to give evidence. *Barrow* v. *Humphreys*, 3 *B. & Ald.* 498: *Mullett* v. *Hunt*, 1 *C. & M.* 752: *Dixon* v. *Lee*, 1 *C.*, M., *& R.* 645: *R.* v. *Stretch*, 3 *Ad. & Ell.* 503: *Lamont* v. *Crook*, 6 *M. & W.* 615. It is doubtful whether the justices at sessions, &c., have authority to issue an attachment; the only mode of proceeding against the witness in such a case seems to be by indictment. As to the mode of proceeding where the *subpœna* has been served in Ireland or Scotland, *see ante, p.* 157, *and stat.* 45 *G.* 3, *c.* 92.

## 6. *Witnesses' Expenses, &c.*

At common law, a witness in criminal cases was not entitled to his expenses; 2 *Hawk, c.* 46, *s.* 173; at least if he attended on the part of the prosecution. This, in cases of felony, was provided for by stats. 27 *G.* 2, *c.* 3, 18 *G.* 3, *c.* 19, and 58 *G.* 3, *c.* 70, which did not extend to cases of misdemeanor, and are now repealed.

In *felonies*, by stat. 7 *G.* 4, *c.* 64, *s.* 22, the court before which any person is prosecuted or tried for any felony, at the request of the prosecutor, or of any other person who shall appear on recognisance or subpœnaed to prosecute or give evidence, may order the treasurer of the county, 7 *G.* 4, *c.* 64, *s.* 24, or, if the offence be committed within counties, &c., which do not contribute to the county rates, the magistrate, overseer, or other officer having the collection and disbursement of the rate within the county, &c., 7 *G.* 4, *c.* 64, *s.* 25, to pay to the prosecutor the costs and expenses incurred by him in preferring the indictment, and to the prosecutor and his witnesses a reasonable allowance for their expenses, and for

their trouble and loss of time in attending before the examining magistrate, the grand jury, and otherwise, carrying on the prosecution; and though no bill be preferred, the court may order to be paid to those who have *bonâ fide* attended the court, in obedience to their recognisance or *subpœna*, a reasonable allowance for their expenses and trouble, and loss of time in attending before the examining magistrates, and obeying the recognisance or *subpœna*. The amount to be paid to the prosecutor and his witnesses for trouble and loss of time, and expenses in attending before the examining magistrates, must be ascertained by the certificate of the magistrate granted before the trial. 7 *G.* 4, *c.* 64, *s.* 22. The other expenses are allowed by the proper officer of the court; but the fees attendant on the examination, and the allowance to the prosecutor and his witnesses for attending before the magistrate, can only be allowed upon the production of this certificate. And the court has no power to allow the expenses of witnesses attending before the coroner, upon an inquiry previous to the indictment. *R.* v. *Rees*, 5 *C.* & *P.* 302: *R.* v. *Taylor*, *Id.* 301. A party who is bound over to prosecute at a superior court by a court of quarter sessions is entitled to his expenses under the statute. *R.* v. *Paine*, 7 *C.* & *P.* 135. And where a bill has been preferred for felony, the court may allow the costs of the prosecutor on his application, (including those of the witnesses), though neither he nor they be under recognisances, or, as it seems, subpœnaed. *Reg.* v. *Butterwick*, 2 *M.* & *Rob.* 196. It may be necessary to mention, that the expenses are not allowed till after the trial has actually taken place; and that, therefore, when the trial of a prosecution is put off, the court will make no order with reference to the expenses. *R.* v. *Hunter*, 3 *C.* & *P.* 391. Upon an indictment for felony, removed by *certiorari* into the Queen's Bench at the instance of the prosecutor or prisoner, and tried at Nisi Prius, no costs can be allowed either by the presiding judge or the Court of Queen's Bench. *R.* v. *Treasurer of Exeter*, 5 *Man.* & *R.* 167.

By the same statute in certain *misdemeanors*, namely, "Assaults with intent to commit felony"—"Attempts to commit felony"—"Riots"—"Misdemeanors for receiving any stolen property, knowing the same to have been stolen"—"Assaults upon peace officers, in the execution of their duty, or upon persons acting in their aid"—"Neglect and breach of duty as a peace officer"—"Assaults committed in pursuance of any conspiracy to raise the rate of wages"—"Knowingly and designedly obtaining any property by false pretences"—"Wilful and indecent exposures of the person"—"Wilful and corrupt perjury"—"Subornation of perjury," the court has the same power to allow the expenses of the prosecutor and his witnesses, and to order a reasonable compensation for their trouble and loss of time, whether a bill be or be not preferred; but this power of the court does not extend to the payment of expenses or compensation for trouble and loss of time in attending efore the examining magistrate. 7 *G.* 4, *c.* 64, *s.* 23. And by 7 *W.* 4 & 1 *Vict.* *c.* 44, the same power is granted to the court, on prosecutions for endeavouring to conceal the birth of a child, as is givên by the 7 *G.* 4, *c.* 64, in cases of *felony:* in such case, therefore, compensation may be made for the expenses, trouble, and loss of time in attending before the magistrate. Where an indictment for a misdemeanor is removed by *certiorari* by

the prosecutor into the Court of Queen's Bench, and tried at Nisi Prius, the prosecutor and witnesses are not entitled to costs under this statute. *R.* v. *Johnson*, 1 *Mood. C. C.* 173. *See R.* v. *Richards*, 8 *B.* & *C.* 240; 2 *M.* & *R.* 405. It is doubtful also, whether, where a prosecutor is not bound over to prosecute at the assizes, the court of assize has power to grant his expenses under the 7 *G.* 4, *c.* 64, *s.* 23; but in such a case, if the witnesses be subpœnaed, the court of assize may grant *their* expenses under that section. *R.* v. *Jeyes*, 3 *Ad.* & *E.* 416. So, if the prosecutor have included his name in a *subpœna*, though he is not bound over to prosecute, the court may order him his costs as prosecutor as well as witness. *R.* v. *Sheering*, 7 *C.* & *P.* 440. The Court of Queen's Bench will not grant a *mandamus* to compel the treasurer of a district to pay such expenses, in obedience to the order of the court of assize: the proper remedy is to indict the treasurer if he refuse to pay. *R.* v. *Jeyes, supra;* 1 *Chit. Rep.* 650. The *entire* order of the court must be served upon the treasurer; and where the order made was to pay an aggregate sum, the details being annexed, and the attorney tore off the half sheet which contained the details, and presented only the other, it was held that the treasurer was justified in refusing to pay. *Reg.* v. *Jones*, 2 *Mood. C. C.* 171; 9 *C.* & *P.* 401. *See* 7 *G.* 4, *c.* 64, *s.* 26.

In felonies and the misdemeanors before mentioned, committed upon the high seas, the judge of the Court of Admiralty may order the assistant to the counsel for the Admiralty to pay such costs, expenses, and compensation to the prosecutors and witnesses, in the same manner as other courts may order the treasurer of the county to pay the same; 7 *G.* 4, *c.* 64, *s.* 27; and the like power is, by the 7 & 8 *Vict. c.* 2, given to the other courts which are empowered thereby to try offences committed on the high seas. (*Ante, p.* 21).

As to the prosecutor's and witnesses' expenses, where the offence was committed in the county of a city or town corporate, and the offender tried in the next adjoining county, *see* 38 *G.* 3, *c.* 52; 51 *G.* 3, *c.* 100; 5 & 6 *W.* 4, *c.* 76; (*ante p.* 20).

In addition to these allowances, any court of oyer and terminer and gaol delivery may, if any person shall appear to have been active in or towards the apprehension of any person charged with any of the following offences, order the sheriff of the county in which the offence was committed, 7 *G.* 4, *c.* 64, *s.* 29, to pay to such person such a sum of money as shall seem reasonable and sufficient to compensate for his expenses, exertions, and loss of time, viz., in cases of "Murder"—"Feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person"—"Stabbing"—"Cutting"—"Poisoning"—"Administering anything to procure the miscarriage of any woman"—"Rape"—"Burglary"—"Felonious housebreaking"—"Robbery on the person"—"Arson"—"Horse stealing"—"Bullock stealing," (which includes all cases of cattle stealing of that particular description, *e. g.* ox, cow, heifer, &c. *R.* v. *Gilbrass*, 7 *C.* & *P.* 444)—"Sheep stealing"—"Being accessary before the fact to any of the offences aforesaid"—"Receiving stolen property, knowing it to have been stolen:" and, in the last-mentioned case, the justices at sessions have the same power. 7 *G.* 4, *c.* 64, *s.* 28. Such rewards are not confined to cases where the person apprehending has had an actual loss of time, or been at an expense. *R.* v. *Barnes*, 7 *C.* & *P.* 166. If the facts on which the

application is grounded have not appeared in evidence, the judge will require them to be laid before him on affidavit. *R.* v. *Jones, Id.* 167. If any man be killed in endeavouring to apprehend any person charged with any of the offences before mentioned, the court may order the under-sheriff of the county to pay a sum of money to his widow, if he were married, or to his children, in case his wife be dead, or to his father or mother, in case he shall have left neither wife nor child. 7 *G.* 4, *c.* 64, *s.* 30.

### 7. *Examination of Witnesses.*

It may be necessary to premise, that, when the cause is called on, or at any other period during the trial, the court, at the request of the defendant, *R.* v. *Vaughan, Holt,* 689 ; 5 *St. Tr.* 20 : *and see* 4 *St. Tr.* 191, or indeed at the request of either party, will order such of the witnesses of the opposite party as have not yet been examined, or who are not under examination, to leave the court until they shall be called for in their order, so that each witness may be examined out of the hearing of the other witnesses on the same side, who are to be examined after him. *Southey* v. *Nash,* 6 *C. & P.* 632. The attorney for either party is not within this rule. *Pomeroy* v. *Baddeley, Ry. & M. N. P.* 430. It has been said, that if, after such an order, a witness be present during the examination of the other witnesses, he cannot be examined ; *Attorney-General* v. *Bulpit,* 9 *Price,* 4 ; but the conduct of the witness seems to be no ground for depriving the Crown, or the defendant, of a witness, and the practice is to allow him to be examined, subject to observation as to his conduct in disobeying the order ; *R.* v. *Colley, Moo. & M.* 329 ; but this is a matter for the discretion of the judge. *Parker* v. *M'William,* 6 *Bing.* 683 : *Beamon* v. *Ellice,* 4 *C. & P.* 585 : *Cook* v. *Nethercote,* 6 *C. & P.* 741 : *Thomas* v. *David,* 7 *C. & P.* 35.

It should also be observed, that, although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, it is usual so to do, that the defendant may cross-examine them ; *R.* v. *Simmonds,* 1 *C. & P.* 84 : *R.* v. *Beezley,* 4 *C. & P.* 220 : *Reg.* v. *Bull,* 9 *C. & P.* 22 ; and, if the counsel will not, the judge in his discretion may. *R.* v. *Whitehead, Id.* 322, *n.* : *Reg.* v. *Holden,* 8 *C. & P.* 606. *See Reg.* v. *Stroner,* 1 *C. & K.* 650. It seems that, if the counsel for the prosecution, at the instance of the prisoner's counsel, calls a witness, but does not ask him a question, the former is entitled to examine the witness after he has been examined by the prisoner's counsel. *R.* v. *Harris,* 7 *C. & P.* 581.

It should also be mentioned, that, during the progress of the trial, the judge may question the witnesses ; and that, even though the counsel for the prosecution has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries of the witnesses he thinks fit, in order to answer the objection. *R.* v. *Remnant, R. & R.* 136. Where, after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held that the prisoner's counsel had a right to cross-examine again if he thought it material. *R.* v. *Watson,* 6 *C. & P.* 653.

It may be observed here, that, where there are two prosecutions against the same party for felony, the judge will not, even by consent, take the evidence on the first trial as given on the second; but the witnesses may be re-sworn in the second case, and their evidence read over to them from the judge's notes. *R.* v. *Foster*, 7 *C. & P.* 495. *See Reg.* v. *Thornhill*, 8 *C. & P.* 575, (*ante, p.* 119).

*Examination.*]—After the witness has been sworn, the counsel for the party who calls him proceeds to examine him. In doing this, two things are principally to be attended to: 1*st*, that the questions be pertinent to the matter immediately in issue; and, 2*ndly*, that they be not leading questions.

*First.* The questions must be pertinent to the matter immediately in issue. No question should be asked of a witness upon a direct examination, the probable answer to which cannot have a tendency to prove the offence or defence, or other matter put in issue by the pleadings. In the case of circumstantial evidence, the courts of necessity allow of a greater latitude in this respect; but still, in this case, the questions must be such as are likely to elicit evidence of facts from which the jury may reasonably presume the guilt or innocence of the prisoner. Upon an indictment for a conspiracy, general evidence of the conspiracy charged may be received in the first instance, although it cannot affect the defendant, unless afterwards brought home to him or to an agent employed by him. *The Queen's case*, 2 *B. & B.* 302. (*See ante, p.* 104). And the same rule applies where a defendant seeks, by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of the defence, (provided the proposed evidence be previously opened to the court), as in the case of a prosecution for a conspiracy. *Ib.* So, if A. commit a burglary, and B. stay outside the house for the purpose of preventing interruption; upon the trial of B., the prosecutor first proves the offence committed by A., and then brings the guilt home to B. by proving his share in it. In these cases, however, the matter to be proved naturally branches itself into two propositions: that a certain conspiracy existed, and that the defendant was engaged in it; that A. committed the burglary, and that B. aided and assisted him in the commission of it.

*Secondly.* It is a general rule, that, in a direct examination of a witness, he shall not be asked leading questions, or, in other words, questions framed in such a manner as to suggest to the witness the answers required of him. To this rule, however, there are a few exceptions. To identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked, in direct terms, if that be the person he meant. *R.* v. *Watson*, 2 *Stark.* 116: *R.* v. *De Berenger*, 1 *Stark. Ev.* 125. Where a witness swears to a certain fact, and another witness is called for the purpose of contradicting him, the latter may be asked, in direct terms, whether that fact ever took place. *Courteen* v. *Touse*, 1 *Camp.* 43. So, if the witness appear evidently to be hostile to the party who has called him, the counsel may put leading questions to him, having first obtained permission of the court to do so. *Peake, Ev.* 198; 1 *Ph. Ev.* 283; *Clarke* v. *Saffrey*, *R. & M. N. P.* 126: *and see Basten* v. *Carew*, *Id.* 127: *Reg.* v. *Chapman*, 8 *C. & P.* 559: *Reg.* v. *Ball*,

8 *C. & P.* 745. And, lastly, questions which are merely introductory to others that are material are in general allowed to be asked in direct terms, without objection.

If an irrelevant or leading question be put, the counsel on the other side should immediately interpose and object to it. So, if a witness be asked whether a certain representation was made, the opposite counsel may interpose, and ask him whether the representation in question were by parol or in writing; for, if the latter, the writing must be produced. *The Queen's case*, 2 *B. & B.* 292.

We have seen (*ante*, *p.* 142) that a witness can be allowed only to speak of facts within his own knowledge and recollection, except in matters of science, in which case his opinion is admissible evidence. *See R.* v. *Wright*, *R. & R.* 456, (*ante*, *p.* 143). He cannot, therefore, be admitted to read his evidence; 5 *St. Tr.* 445; but he will be allowed to refresh his memory from any book or paper, if he can afterwards swear to the fact from his recollection. *Doe* v. *Perkins*, 3 *T. R.* 749: *and see Borough* v. *Martin*, 2 *Camp.* 112. If he know the fact, however, only from seeing it in the book or paper, the original book or paper must be given in evidence and proved by other means. 3 *T. R.* 749. In like manner, depositions made by an old witness have been allowed to be read to him, for the purpose of refreshing his memory as to dates, &c. *Vaughan* v. *Martin*, 1 *Esp.* 440. A witness cannot refresh his memory with a *copy* of an instrument which might itself be used for refreshing his memory, unless the copy were made by himself, or in his presence, and he know it to be correct. *Burton* v. *Plummer*, 4 *Nev. & M.* 315; 2 *Ad. & El.* 341.

It may be necessary to observe here, that, when a witness is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness. *Doe* v. *Roe*, 2 *Camp.* 280.

*Cross-examination.*]—When the direct examination is finished, the witness may then be cross-examined by the counsel for the opposite party. Or, if the party calling a witness do not think proper to examine him after he is called and sworn, the witness may nevertheless be cross-examined by the counsel for the opposite party. *R.* v. *Brook*, 2 *Stark.* 472. *See Morgan* v. *Bridges*, *Id.* 314: *Phillips* v. *Eamer*, 1 *Esp.* 357. (*See ante*, *p.* 162). Where a witness was called, and had only answered an immaterial question, when he was stopped by the judge, *Gurney*, B., ruled that the opposite party had no right to a cross-examination. *Creevy* v. *Carr*, 7 *C. & P.* 64.

When a witness is produced, the first thing that claims the attention of the counsel for the opposite party is, whether the witness be competent; and if not, then in what manner the objection to his competency must be made. (*See ante*, *p.* 143).

Formerly, it was holden that the objection for incompetency must have been made before the witness was sworn in chief; but it has been generally allowed to be made at any time during the trial. *Stone* v. *Blackburn*, 1 *Esp.* 37: *Turner* v. *Pearte*, 1 *T. R.* 717. However, it is still always advisable to make the objection before the

witness has been examined in chief, and, if he can be examined as to it, to examine him on the *voir dire;* and more recent cases appear to render it necessary that the objection should, in strictness, be taken at that time. *See Hartshorne* v. *Watson,* 5 *Bing. N. C.* 477: *Wollaston* v. *Hakewill,* 3 *Scott, N. R.* 593. And the opposite party cannot, after the witness has been sworn and examined, adduce other evidence to shew his incompetency. *Dewdney* v. *Palmer,* 4 *M. & W.* 664.

The next thing that claims the opposite counsel's attention, in the course of the examination, is, whether parol evidence be the best evidence of the facts to which the witness deposes; and, if not, whether grounds have been laid for its admission as secondary evidence; whether the questions be relevant and pertinent to the matter in issue; and whether they be leading questions. If the evidence of the witness be objectionable in any of these respects, the counsel should immediately interpose, and make his objection.

Supposing, however, the witness and his evidence not open to these preliminary objections, the opposite counsel must then proceed to cross-examine him, if, in his judgment, a cross-examination be necessary or advisable. In giving his evidence, a witness tells the truth, wholly or partially, or tells a falsehood. If he tell the whole truth, a cross-examination may be dangerous, as it may have the effect of rendering his story more circumstantial, and impressing the jury with a stronger opinion of its truth; it is better, in such a case, either not to cross-examine him at all, or to confine your questions to his credibility, by impugning his means of knowledge, his disinterestedness, his integrity, or his veracity. (*See ante, p.* 149).

If the witness tell only part of the truth, then the opposite counsel, if the residue be favourable to his client, will immediately proceed to cross-examine him as to it; but, if unfavourable, the counsel will either refrain altogether from cross-examining him, or will confine his questions to the witness's credibility, as above mentioned.

If, on the other hand, the evidence of the witness be false, then the whole force of the cross-examination must be directed to his credibility; (*see ante, p.* 149); and you may afterwards prove the truth by other witnesses.

In cross-examining a witness, the counsel may ask him leading questions; that is, he may lead the witness, so as to bring him directly to the point in which he requires the answer, and this whether the witness be a willing or an adverse one; *see Parkin* v. *Moon,* 7 *C. & P.* 408; but he will not be allowed to put into the witness's mouth the very words he is to echo back again. *Per Buller,* J., in *R.* v. *Hardy,* 24 *How. St. Tr.* 755. The questions, however, must be either relevant and pertinent to the matter in issue, or calculated to elicit the witness's title to credit. It is not usual to cross-examine witnesses to character, unless the counsel cross-examining have some distinct charge on which to cross-examine them; *see R.* v. *Hodgkiss,* 7 *C. & P.* 298; and, if the only evidence called on the prisoner's part is evidence as to character, though the counsel for the prosecution is in strictness entitled to a reply, it is not usual to exercise it, except in extreme cases. *See R.* v. *Stannard,* 7 *C. & P.* 673: *R.* v. *Whiting, Id.* 771. (*See ante, p.* 95).

When, in cross-examining a witness, you shew him a letter, and he admits it to be of his handwriting, the ordinary course is to have the letter read as part of your evidence, after you have opened your case. But if it become necessary to have the letter read, in order to found certain questions with relation to the contents of the letter to be propounded to the witness, the court, upon application, will allow the letter to be read at the time of the cross-examination, subject, of course, to the consequences of the letter being considered as part of your evidence. *The Queen's case*, 2 *B. & B.* 288. If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries, without making them his evidence, and the jury may see them if they think fit; but, if the opposite counsel cross-examine as to other entries in the same book, he makes them his evidence. *Gregory* v. *Taverner*, 6 *C. & P.* 281. If the cross-examining counsel put a paper into the witness's hands, and put questions on it, and anything comes of those questions, the opposite counsel has a right to see the paper and cross-examine on it; but, if the cross-examination founded on the paper entirely fails, and nothing comes of it, the opposite counsel cannot demand to see the paper. *Reg.* v. *Duncombe*, 8 *C. & P.* 369. As to cross-examining on the depositions, *see ante*, *p.* 152.

If, upon the trial of on indictment, it appear, upon cross-examination of one of the witnesses for the prosecution, that J. S. was employed by the prosecutor for the purpose of procuring and examining evidence and witnesses in support of the indictment, the defendant cannot give evidence of J. S.'s having offered a bribe to a certain person, to induce him to give evidence touching the matter of the indictment, unless such person have been examined as a witness. *The Queen's case*, 2 *B. & B.* 302.

It may be necessary to mention, that, if, upon the trial of an indictment, the defendant himself address the jury, he will not be entitled to the assistance of counsel to cross-examine the witnesses; but counsel may argue points of law, and suggest questions to be put to the witnesses. *R.* v. *White*, 3 *Camp.* 98: *R.* v. *Parkins*, *Ry. & M. N. P.* 166. If the prisoner's counsel has addressed the jury, the prisoner himself will not be allowed to address them too; *R.* v. *Boucher*, 8 *C. & P.* 141: *Reg.* v. *Rider*, *Id.* 539: *Reg.* v. *Burrows*, 2 *M. & Rob.* 124; though it has been permitted in very peculiar cases. *See Reg.* v. *Malings*, 8 *C. & P.* 242: *Reg.* v. *Walkling*, *Id.* 243. And the counsel for the prisoner cannot be permitted to state the prisoner's account of the transaction, which he is not in a situation to support by evidence. *R.* v. *Beard*, 8 *C. & P.* 142: *Reg.* v. *Butcher*, 2 *M. & Rob.* 229.

*Re-examination.*]—If any new fact arise out of the cross-examination, the witness may be examined as to it by the counsel who first examined him. In the same manner he may be re-examined when necessary, in order to explain any part of his cross-examination. In *The Queen's case*, it was holden, that, if a witness, upon his cross-examination, admit his having used certain expressions in a conversation with a person not a party to the cause, the opposite counsel, in re-examining the witness, is confined to such questions as may elicit the meaning of the expressions, and the motives of the witness for using them. But where a witness deposes to certain expressions

being used by a party to the cause, the counsel for that party is entitled to re-examine the witness as to the whole of the conversation in which the expressions occurred; because the expressions are given in evidence, in such a case, as an admission of the party, and the whole of his admission should be taken together. 2 *B.* & *B.* 204. If a witness whose name is on the back of the indictment be called merely to allow the prisoner to cross-examine him, any question put by the prosecutor's counsel afterwards must be considered as a re-examination, and nothing can be asked which does not arise out of the cross-examination. *R.* v. *Beezley*, 4 *C.* & *P.* 220.

# BOOK II.

## PLEADING AND EVIDENCE IN PARTICULAR CASES.

## PART I.

### OFFENCES AGAINST INDIVIDUALS.

## CHAPTER I.

### OFFENCES AGAINST THE PROPERTY OF INDIVIDUALS.



### SECT. 1.

#### LARCENY.

*Statutes.*

7 & 8 *G.* 4, *c.* 29, *s.* 2.—*Distinction between Grand and Petit Larceny abolished.*]—Enacts, that the distinction between grand larceny and petty larceny shall be abolished; and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents, in all respects, as grand larceny was before the commencement of this act; and every court, whose power as to the trial of larceny was, before the commencement of this act, limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessaries to such larceny.

*Sect.* 3.—*Punishment for Simple Larceny.*]—Enacts, that every person convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be im-

prisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

*Sect. 4.—Place and Mode of Imprisonment for Larcenies, &c.*]—With regard to the place and mode of imprisonment for all indictable offences punishable under this act, enacts, that, where any person shall be convicted of any felony or misdemeanor punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction; and also to direct that the offender shall be kept in solitary confinement for the whole (*see* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, *infra*) or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet.

7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5.—*Solitary Confinement.*]—Enacts, that, from and after the 1st day of October, 1837, it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year. [By the Prisons Regulation Act, 2 *&* 3 *Vict. c.* 56, *s.* 4, the *separate* confinement provided for by that act is not to be deemed *solitary* confinement, within the meaning of any act forbidding solitary confinement for more than a limited time.]

7 *&* 8 *G.* 4, *c.* 28, *s.* 10.—*Where the Convict is under a previous Sentence.*]—Enacts, that, wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded.

*Indictment.*

MIDDLESEX, to wit: The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, [*or*, in the year of our lord ——], at the parish aforesaid, in the county caforesaid, [*three pairs of shoes, of the value of twelve shillings, one shirt, of the value of four shillings, and one waistcoat, of the value of seven shillings*], of the goods and chattels of one J. N., then and there being found, feloniously did steal, take, and carry away: against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for seven years, or imprisonment not exceed-*

*ing two years, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement;* 7 & 8 *G.* 4, 4, *c.* 29, *s.* 4; *such confinement not exceeding one month at any one time, nor three months in any one year;* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5); *and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 & 8 *G.* 4, *c.* 29, *s.* 3.

*If the defendant be already under sentence of transportation or imprisonment for another crime, the court may award the transportation or imprisonment for every subsequent felony to commence at the expiration of the transportation or imprisonment to which the prisoner was previously sentenced.* 7 & 8 *G.* 4, *c.* 28, *s.* 10. [*This enactment is applicable to all felonies, but will not be repeated after each sentence in the subsequent pages of this book.*]

## *Evidence.*

*J. S. late of, &c.*]—It is immaterial whether this be the correct name and addition of the defendant or not; if he do not plead the misnomer or wrong addition in abatement, he waives all objection to the indictment for any error in this respect. The prosecutor has only to prove that the defendant is the person who actually committed the offence; which is done either by identifying him as the party who committed it, or by circumstantial evidence. (*See ante, p.* 122).

*On the third Day of August, &c.*]—The time and place here stated need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment, (*ante, pp.* 40, 96), or at any other place, provided it be within the county, or other extent of the court's jurisdiction, (*ante, pp.* 40, 97), it will be sufficient. Or if it be proved that the larceny was actually committed by the defendant in another county, or in another part of the United Kingdom, and that he carried the goods at any distance of time through or into the county or other extent of the court's jurisdiction, it will be sufficient; unless the nature of the property be changed, and the indictment be for stealing the article in its original state. So, it will be sufficient if the offence be either begun or completed in the county in which the defendant is indicted; or be committed within five hundred yards of the boundary of such county. And where a larceny is committed on a person, or with respect to property in or upon any coach, &c., or vessel, during a journey or voyage, it will be sufficient if the coach or vessel, in the progress of the journey or voyage, passed through the county, or by the boundary of the county in which the defendant is indicted. (*See ante, pp.* 24, 25).

*Three Pairs of Shoes, &c.*]—The species of goods must be proved as laid; for instance, upon this indictment, if the prosecutor were to fail in proving that shoes, or a shirt, or a waistcoat, were stolen, the defendant must be acquitted, although there be indisputable evidence of his having stolen other articles. (*See ante, pp.* 49, 99). But it is not necessary that the prosecutor should prove all the articles mentioned in the indictment to have been stolen; if he prove the defendant to have stolen any one of them, (as, for instance, if he

prove that the defendant stole the waistcoat, or the shirt, or one pair of the shoes), it will be sufficient. (*Ante, pp.* 49, 99). Goods may be described by the name by which they are known in trade; as, for instance, a set of new handkerchiefs in the piece may be described as so many handkerchiefs, though they are not separated from each other, if the pattern designate each, and they are considered in trade as so many handkerchiefs. *R.* v. *Nibbs, R. & R.* 25. Ingots of tin, or a bar of iron, may be described as so many pounds weight of tin or iron; but where an article has obtained, in common parlance, a name of its own, it would be wrong to describe it by the name of the material of which it is composed. *Reg.* v. *Mansfield, C. & Mar.* 140. An indictment for a larceny of live animals need not state them to be alive, because the law will presume them to be so, unless the contrary be stated; but if, when stolen, the animals were dead, that fact must be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal. *R.* v. *Edwards, R. & R.* 497: *R.* v. *Halloway,* 1 *C. & P.* 198. *See R.* v. *Williams,* 1 *Mood. C. C.* 107. But if an animal have the same appellation whether it be alive or dead, and it make no difference as to the charge whether it were alive or dead, it may be called, when dead, by the appellation applicable to it when alive. *R.* v. *Puckering,* 1 *Mood. C. C.* 242. Where an indictment charged a defendant with stealing "one bushel of chaff, one bushel of oats, and one bushel of beans," and the evidence was that the articles were mixed together, *Bayley,* J., held the description insufficient, and said that it should have been "a certain mixture, consisting of one bushel of chaff, &c." 3 *Chit. C. L.* 947. (*See ante, pp.* 48, 49).

Where several articles are mentioned in the indictment, the prosecutor must prove that they were all taken at the same time, or at several times so near to each other as to form parts of one continuing transaction; otherwise the court will put the prosecutor to elect for which act of larceny he will prosecute, and will oblige him to confine his evidence to that. *R.* v. *Smith, Ry. & M. N. P.* 295. *See R.* v. *Ellis,* 6 *B. & C.* 145. But the court will not thus put the prosecutor to his election, merely because the goods might have been, and probably were, stolen at different times, if, from any thing appearing in the case, it be not impossible that they might all have been stolen at one time. *R.* v. *Dunn,* 1 *Mood. C. C.* 146: *Reg.* v. *Hinley,* 2 *M. & Rob.* 524. (*See ante, p.* 59).

The goods taken must appear in evidence to be *personal goods;* for none other can be the subject of larceny at common law.

*First.* Things real, or which savour of the realty, cannot be the subject of larceny at common law; and so strict was the rule in this respect, that a larceny could not be committed even of title-deeds, 1 *Hale,* 510; 1 *Hawk. c.* 33, *s.* 35; 2 *Str.* 1137, or any other charter or writing concerning the realty, *R.* v. *Westbeer,* 1 *Leach,* 12: *R.* v. *Walker, Ry. & M.* 155, or even of the box in which they were kept. 1 *Hale,* 510: 3 *Inst.* 109. But now, to steal, or for any fraudulent purpose to take from its place of deposit, or from any person having the lawful custody thereof, or unlawfully and maliciously to obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending,

or terminated in any such court: or any bill, answer, interrogatory, deposition, affidavit, order or decree, or any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, is a misdemeanor punishable by transportation, or by fine or imprisonment, or both. 7 *&* 8 *G.* 4, *c.* 29, *s.* 21. And to steal, or fraudulently destroy or conceal, either during the life of the testator or after his death, any will, codicil, or other testamentary instrument, whether the same relate to real or personal estate, or to both, 7 *&* 8 *G.* 4, *c.* 29, *s.* 22, or to steal any paper or parchment written or printed, or partly written or printed, being evidence of the title, or of any part of the title, to any real estate, 7 *&* 8 *G.* 4, *c.* 29, *s.* 23, is now a misdemeanor, punishable in like manner; without prejudice, however, to any remedy which the party aggrieved by the offence may have, either at law or in equity. 7 *&* 8 *G.* 4, *c.* 29, *s.* 24. Lands, tenements, and hereditaments, (either corporeal or incorporeal), cannot, in their nature, be taken and carried away. Of things, also, which adhere to the freehold, as corn, grass, trees, and the like, or lead or other thing attached to a house, no larceny can be committed at common law; but the severance of them was, and, in many cases, still is, a mere trespass, and the subject of a civil action only. But it was always holden at common law, that if the owner, or a stranger, sever them, and another man come and steal them—or if the thief sever them at one time, and at another come and take them away—it is a larceny. 3 *Inst.* 109: 1 *Hale*, 510. And now, stealing, or severing with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, is felony, and punishable as simple larceny. 7 *&* 8 *G.* 4, *c.* 29, *s.* 37. To steal or cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, above the value of 1*l.*, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, or above the value of 5*l.* in any other situation, is felony, and punishable as simple larceny; 7 *&* 8 *G.* 4, *c.* 29, *s.* 38: when the injury amounts to 1*s.* at the least, summary punishment may be imposed, by fine not exceeding 5*l.* above the injury done, upon the first conviction; by imprisonment, with hard labour, not exceeding twelve months, upon the second conviction, and if the conviction take place before two magistrates, by public or private whipping; and the third offence, after two previous convictions, is felony, punishable as simple larceny. 7 *&* 8 *G.* 4. *c.* 29, *s.* 39. To steal, or cut, break, or throw down, with intent to steal, any part of any live or dead fence, or any wooden post, pail, or rail, set up or used as a fence, or any stile or gate, or any part thereof respectively; 7 *&* 8 *G.* 4, *c.* 29, *s.* 40; to have possession of the whole or any part of any sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pail, rail, stile, or gate, or any part thereof, respectively, of the value of 2*s.*, without satisfactorily accounting for that possession; 7 *&* 8 *G.* 4, *c.* 29, *s.* 41; and to steal, or destroy, or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or distilling, or dyeing, or for or in the course of manufacture, growing in any land open or inclosed, not being a garden, orchard, or nursery ground, 7 *&* 8 *G.*

4, *c.* 29, *s.* 43, is punishable, upon summary conviction, by fine, imprisonment, with or without hard labour, and by public or private whipping, according to the nature of the offence. So, to steal, or destroy, or damage with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hot-house, green-house, or conservatory, is for the first offence punishable, upon summary conviction, by imprisonment, with or without hard labour, not exceeding six months, or by fine, not exceeding 20*l.*; but the second offence is felony, punishable as simple larceny. 7 *&* 8 *G.* 4, *c.* 29, *s.* 42. And lastly, to steal or rip, cut or break, with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed to any building, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, is felony, punishable as simple larceny. 7 *&* 8 *G.* 4, *c.* 29. *s.* 44. The offender cannot, upon an indictment for this statutable felony, be convicted of simple larceny. *Reg.* v. *Gooch*, 8 *C.* *&* *P.* 293. *See R.* v. *Millar*, 7 *C.* *&* *P.* 665, *ante*, *p.* 25.

*Secondly.* Bonds, bills, &c. being mere *choses in action*, are not the subject of larceny at common law, for they are of no intrinsic value. *Caley's case*, 8 *Co.* 33; 1 *Hawk. c.* 33, *s.* 35. But now, by stat. 7 *&* 8 *G.* 4, *c.* 29, *s.* 5, to steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or any debenture deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of this kingdom or of any foreign state, or any warrant or order for the delivery or transfer of any goods or valuable thing, is felony, of the same nature and degree, and punishable in the same manner, as if the offender had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in the warrant or order. The several documents hereinbefore enumerated are included in, and denoted by the words "valuable security," wherever they occur in this statute. 7 *&* 8 *G.* 4, *c.* 29. *s.* 5. So, to steal any exchequer order or tally, exchequer bill, navy bill, or divided warrant of the Bank or South Sea Company, is declared by stat. 2 *G.* 2, *c.* 25, *s.* 3, to be felony, and is punishable in the same manner as if the offender had stolen goods to the value of the sum secured by such written instruments or remaining due thereon; for the repeal of this statute, by stat. 7 *&* 8 *G.* 4, *c.* 27, is qualified by the second section of that act, which enacts that the repeal shall not affect or alter such parts of the acts repealed as relate to any branch of the public revenue, the Bank of England, or the South Sea Company. If any officer or servant of the Bank of England, entrusted with any note, bill, dividend, warrant, bond, deed, or other security, money, or other effects, belonging to the company;

or having any bill, dividend, warrant, bond, deed, or other security or effects of any person or persons lodged or deposited with the company, or with him as officer or servant of the company, shall secrete, embezzle, or run away with the same, it is felony, death. 15 *G.* 2, *c.* 13, *s.* 12. *See* 35 *G.* 3, *c.* 66, *s.* 6; 37 *G.* 3, *c.* 46, *s.* 6. And a similar provision is contained in stat. 24 *G.* 2, *c.* 11, *s.* 3, with respect to the South Sea Company. And by stat. 7 *W.* 4 *&* 1 *Vict.* *c.* 36, *s.* 26, if any person employed under the post-office shall steal, or for any purpose whatever, embezzle, secrete, or destroy, a post letter, it is felony, punishable by transportation or imprisonment; or if the letter contain a chattel, or money, or valuable security, by transportation for life. So, to steal any chattel, money, or valuable security out of a post letter, is felony, punishable by transportation for life, 7 *W.* 4 *&* 1 *Vict.* *c.* 36, *s.* 47. If any person in the public service, intrusted by virtue of his office with the receipt, custody, management, or control of any valuable security, embezzle or fraudulently misapply the same, or any part thereof, it is felony. 2 *W.* 4, *c.* 4.

*Thirdly.* Larceny at common law cannot be committed of things which are not the subject of property, as of a dead corpse; but it is a high misdemeanor to disinter a dead body for the purpose of dissection, or to sell and dispose of it for gain and profit. *R.* v. *Lynn*, 2 *T. R.* 733: *R.* v. *Gillies*, *R.* *&* *R.* 366. *See R.* v. *Condick*, *D.* *&* *R.* *N. P.* 13. So, of things in which no person has any determinate property, as treasure trove, waifs, &c., till seized, it has been said that larceny cannot be committed; 1 *Hale*, 510; 1 *Hawk.* *c.* 33, *s.* 24; but it would seem that the true owner, though unknown, has still a property in them, before seizure by the lord, unless there be circumstances to shew an intended dereliction of the property. 2 *East*, *P. C.* 606, 607. The same has been said of wreck. But now, to plunder or steal any part of any ship or vessel in distress, wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind, belonging to such ship or vessel, is felony, punishable with transportation for not more than fifteen nor less than ten years, or imprisonment for not more than three years; 7 *W.* 4 *&* 1 *Vict.* *c.* 87, *s.* 1; but if articles of small value, stranded or cast on shore, be stolen without circumstances of cruelty, outrage, or violence, the offender may be prosecuted and punished for simple larceny; 7 *&* 8 *G.* 4, *c.* 29, *s.* 18; and to be in possession of, or to offer or expose to sale, any such goods, &c., without being able satisfactorily to account for the possession thereof, is punishable upon summary conviction by fine. 7 *&* 8 *G.* 4, *c* 29, *ss.* 19, 20. Again, no larceny at common law can be committed of such animals in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren; fish in an open river or pond; or wild fowls, rooks, for instance, *Hanman* v. *Mockett*, 2 *B.* *&* *C.* 934: 4 *D.* *&* *R.* 518, at their natural liberty. 1 *Hale*, 511; *Fost.* 366. But if they are reclaimed or confined, and may serve for food, it is otherwise; for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk or net, and pheasants or partridges in a mew, larceny may be committed. 1 *Hale*, 511: 1 *Hawk.* *c.* 33, *s.* 39. Swans, it is said, if lawfully marked, are the subject of larceny at common law, although at large in a public river; *Dalt.* *Just.* *c.* 156; or whether marked

or not, if they be in a private river or pond. *Ib.* So, all valuable domestic animals, as horses, and all animals *domitæ naturæ*, which serve for food, as swine, sheep, poultry, and the like, and the product of any of them, as eggs, milk from the cow while at pasture. *Foster*, 99, wool pulled from the sheep's back feloniously; *R.* v. *Martin*, 1 *Leach.* 171; and the flesh of such as are *feræ naturæ* may be the subject of larceny. 1 *Hale*, 511. But as to all other animals which do not serve for food, such as dogs, ferrets, though tame and saleable; *R.* v. *Spearing*, *R.* & *R.* 250, and other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law. 1 *Hale*, 512. But now, to course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer, kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land wherein deer are usually kept, is felony, punishable as simple larceny; and if committed in the uninclosed part of any forest, chase, or purlieu, the first offence is punishable upon summary conviction by fine not exceeding 50*l.*, and the second, after a previous conviction, is felony, and punishable as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 26. Summary punishment may also be imposed by fine, not exceeding 20*l.* upon any person who shall have in his possession, or upon his premises with his knowledge, any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, without satisfactorily accounting for such possession, 7 & 8 *G.* 4, *c.* 29, *s.* 27, or who shall set or use any snare or engine whatsoever for the purpose of taking or killing deer in any part of any forest, chase, or purlieu, whether inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer are usually kept, or shall destroy any part of the fence of any land, where deer are then kept. 7 & 8 *G.* 4, *c.* 29, *s.* 28. To take or kill hares or conies in the night-time, in any warren or ground lawfully used for the breeding or keeping of the same, is a misdemeanor; and to take and kill them in any warren or ground in the day-time, or at any time to set any snare or engine for the taking of them, is punishable upon summary conviction by fine. 7 & 8 *G.* 4, *c.* 29, *s.* 30. Stealing any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law; 7 & 8 *G.* 4, *c.* 29, *s.* 31; knowingly being in possession thereof, or of the skin or plumage thereof; 7 & 8 *G.* 4, *c.* 29, *s.* 32; killing, wounding, or taking any dove-house pigeon, under such circumstances as shall not amount to larceny at common law, (*see R.* v. *Brooke*, 4 *C.* & *P.* 131); 7 & 8 *G.* 4, *c.* 29, *s.* 33, is punishable upon summary conviction by fine, imprisonment, and whipping, according to the nature of the offence. Stealing dogs is now a misdemeanor, punishable summarily before justices for the first offence, by penalty or imprisonment, and on indictment for the second offence, by fine and imprisonment. 8 & 9 *Vict.* *c.* 47, (*post*, *p.* 198). To take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, and having a right of fishery therein, is a misdemeanor; and to take and destroy fish in any other water, being private property, or in which there shall be any private right of fishery; and to take and destroy fish by angling in the daytime, in either description of water, is punishable upon summary conviction by fine, varying according to the nature of the offence. 7

*& 8 G. 4, c. 29, s. 34.* And lastly, to steal any oyster or oyster brood from any oyster bed, laying, or fishery, being the property of another, and sufficiently marked out or known as such, is larceny; and to use any dredge or any net, instrument, or engine whatsoever, within the limits of such oyster fishery, for the purpose of taking oysters or oyster brood, although none be taken, or to drag upon the soil of any such fishery with any net, instrument, or engine, is a misdemeanor; *7 & 8 G. 4, c. 29, s. 36.*

*Of the value of, &c.*]—It is immaterial whether the goods be proved to be of the value laid in the indictment or not. (*Ante, pp.* 49, 101). So long as the distinction between grand and petit larceny existed, it was necessary, in order to convict the defendant of the former offence, to prove that the articles or some of them stolen at the same time exceeded the value of 12*d.*; but this distinction is now abolished, and every simple larceny, whatever be the value of the property, is now of the same nature and subject to the same incidents as grand larceny was formerly. *7 & 8 G. 4, c. 29, s. 2, ante, p.* 167. And although, to make a thing the subject of larceny, it must be of *some* value, and stated to be so in the indictment; yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least. *Reg.* v. *Morris, 9 C. & P.* 349.

*Of the Goods and Chattels of one J. N.*]—It must be proved upon the trial, that the goods stolen are the absolute or special property of the person thus named in the indictment. If he be misnamed, if the name thus stated be not either his real name or the name by which he is usually known, or if it appear that the owner of the goods is another and different person from him thus named as such in the indictment, the variance will be fatal, and the defendant must be acquitted. So, if he be described in the indictment as a certain person to the jurors unknown, and it appear in evidence that his name is known, the defendant will be acquitted. *See R.* v. *Walker, 3 Camp.* 264; *R.* v. *Robinson, 1 Holt,* 595; *2 East, P. C.* 651. If the name by which the prosecutor is usually known be used, it will be sufficient: as where "John Walter Hancock" was called in an indictment "John Hancock," by which name he was usually called and known, *Parke*, J., held it to be sufficient; *R.* v. *Berriman, 5 C. & P.* 601; so, where "Richard Jeremiah Pratt" was in like manner called "Richard Pratt," it was holden to be sufficient, because by that name he was generally known; *R.* v.——, *6 C. & P.* 408; and where a prosecutrix was named in the indictment by a name which she had assumed, and by which alone she was known in the neighbourhood, the judges held it sufficient. *R.* v. *Norton, R. & R.* 510. Again, though the name of the prosecutor be mis-spelt, if it be *idem sonans*, it will be sufficient. Thus "Segrave" for "Seagrave," *Williams* v. *Ogle, 2 Str.* 889, "Benedetto" for "Beniditto." *Abitbol* v. *Beniditto, 2 Taunt.* 401, "Whyneard" for "Winyard," pronounced "Winnyard," *R.* v. *Foster, R. & R.* 412, is no variance; but "M'Cann" and "M'Carn," *R.* v. *Tannet, R. & R.* 351, "Shakespeare" and "Shakepear," *R.* v. *Shakespeare, 2 East,* 83, "Tabart" and "Tarbart," *Bingham* v. *Dickie, 5 Taunt.* 814, and "Shutliff" and "Shirtliff," *1 Chitt.* 216, have been decided not to be the same in sound.

It has already been observed, that where goods are stolen out of the possession of a bailee, they may be described in the indictment as the property of the bailor or of the bailee; *ante, p.* 32; 2 *Hale,* 181; although the goods were never in the real owner's possession, but in that of the bailee merely; *R.* v. *Remnant, R. & R.* 136; *R.* v. *Wymer,* 4 *C. & P.* 391; as for instance, goods left at an inn; *R.* v. *Todd,* 2 *East, P. C,* 658; or intrusted to a person for safe keeping, *R.* v. *Taylor,* 1 *Leach,* 356; *R.* v. *Statham, Ib.*; *see Reg.* v. *Ashley,* 1 *C. & K.* 198; or to a carrier to carry, *R.* v. *Deakin,* 2 *East, P. C.* 658; cloth to a tailor to make into clothes; linen to a laundress to wash; *R.* v. *Packer, Ib.*; 1 *Leach,* 357; goods pawned, and the like, may be laid to be the goods and chattels of the person to whom they are so intrusted, &c., or of the owner, at the option of the prosecutor. *See* 2 *Hale,* 181; 1 *Id.* 513; 2 *East, P. C.* 652; 1 *Hawk. c.* 33, *s.* 47. So, where cattle were alleged in the indictment to be the property of a person, who, it appeared in evidence, was merely the agistor, and not the actual owner, the judges held it to be sufficient. *R.* v. *Woodward,* 2 *East, P. C.* 653. So, where A. had taken a house, in which B., his relation, carried on a trade for the benefit of A. and his family, having himself neither a share in the profits nor a salary, but having authority to sell any part of the stock, and to buy goods for the shop, accounting to A., it was held that B. was a bailee of the goods in the shop, and that they might be laid as his property. *Reg.* v. *Bird,* 9 *C. & P.* 44. But where a bailor steals his own goods from his bailee, they must be described as the goods of the bailee. *R.* v. *Wilkinson, R. & R.* 470; *R.* v. *Bramley, Id.* 478. The property must not, however, be laid in one who has neither the actual nor constructive possession of the goods. *R.* v. *Adams, R. & R.* 225. Thus, if it appear that the person named as owner is merely servant to the real owner, the defendant must be acquitted; 2 *East, P. C.* 652; *R.* v. *Hutchinson, R. & R.* 412; for the servant has not a special property in the goods, the possession of the servant being the possession of the master. Where, however, the money has never been in the possession of the master, as where it was received by the servant for him, but he is robbed of it before his arrival at home, it should be laid as the property of the servant, not of the master. *Reg.* v. *Rudick,* 8 *C. & P.* 237. So, where the person named as owner appears to be a married woman, the defendant must be acquitted, because in law the goods are the property of the husband; 1 *Hale,* 513; even though she be living apart from him, upon an income arising from property vested in trustees for her separate use; because the goods cannot be the property of the trustees, nor can they be the property of the wife, for in law she can have no property. *R.* v. *French, R. & R.* 491; *see R.* v. *Wilford, R. & R.* 517. But where goods were stolen from a feme sole, and before indictment she married, it was holden that describing her as the owner of the goods, by her maiden name, was sufficient. *R.* v. *Turner,* 1 *Leach,* 536. A married woman was sent by her husband to sell sheep, and receive the money; she did so, and was robbed of 5*l.*, part of the price of the sheep; it was holden that the money was properly described as the property of her husband. *R.* v. *Roberts,* 7 *C. & P.* 485. Goods let with a ready-furnished lodging must be described as the goods of the lodger, and not as the goods of the original owner; for the owner neither has nor is entitled to the possession, and cannot maintain tres-

pass. *R.* v. *Belstead, R. & R.* 441; *R.* v. *Brunswick*, 1 *Mood. C. C.* 26. But if a larceny be committed by the lodger, then the goods may be described as the property of the owner or person letting to hire. 7 & 8 *G.* 4, *c.* 29, *s.* 45; *see R.* v. *Healey*, 1 *Mood. C. C.* 1. Goods seized under a writ of *fi. fa.* may be described as the property of the party against whom the writ issued; for, though they are *in custodiâ legis*, the original owner continues to have a property in them, until they are sold. *R.* v. *Eastall*, 2 *Russ.* 158. So, if A. steal the goods of B., and C. steal the same goods from A., the goods may be described as the goods of either; of A. because he had the possession, and of B. because the property of the true owner is not divested by the tortious taking. *R.* v. *Wilkins*, 1 *Leach*, 522, 623. Clothes or other necessaries furnished by a father to his child may, it seems, be laid to be the property either of the father or of the child, particularly if the child be of tender age; *R.* v. *Hayne*, 12 *Co.* 113; 2 *East, P. C.* 654; but it is safer, perhaps, to allege them to be the property of the child. *See R.* v. *Forsgate*, 1 *Leach*, 463, 464, *n.*; *Reg.* v. *Hughes, C. & Mar.* 593.

Where goods are the property of several, they must be so described in the indictment. But we have seen (*ante p.* 33), that where goods stolen are the property of partners in trade, joint-tenants, parceners, or tenants in common, (including joint-stock companies and trustees), they may be described as the goods and chattels of one or more of the partners, and another, or others, as the case may be; 7 *G.* 4, *c.* 64, *s,* 14; and that, with a view to this description, it is not necessary that a strict legal partnership should exist. Thus, where D. and C. carried on business in partnership, and the widow of C., upon his death, acted as partner, without taking out administration, and the stock was afterwards divided between her and the surviving partner, but before the division part of the stock was stolen, it was holden sufficient to describe the goods as the joint property of the surviving party and the widow, although it was objected that the children of C. should have been named as joint proprietors, or that the goods should have been described as the joint property of the ordinary and the surviving partner. *R.* v. *Gaby, R. & R.* 178. And where a father and son took a farm upon their joint account, and kept a flock of sheep, their joint property, and the father, upon the death of his son, managed the farm for the joint benefit of himself and his son's children, who were infants, it was holden, upon an indictment for stealing sheep, bred from the joint stock, some before and some after the son's death, that the property was well laid in the father and the son's children. *R.* v. *Scott, R. & R.* 13. It has been already observed (*ante p.* 33), that the words "another or others," in the statute, require attention, and that if property be described as belonging to A. and another, there being more partners than two, or *vice versâ*, the variance will be fatal. Where goods are vested in a body of persons not incorporated, they must not be described as the property of the body, but of the individuals who constitute it, or some of them, as in the case of partners, trustees, and joint-stock companies. *R.* v. *Sherrington*, 1 *Leach*, 513: *R.* v. *Beacall*, 1 *Mood. C. C.* 15. Where a Bible and hymn-book, which had been presented to a Methodist society, were stolen from the Methodist chapel, and were described as the property of John Bennett and others, Bennett being one of the society, and also one of the trustees of the chapel, *Parke*, B., held it to be correct. *R.* v. *Boulton*, 5 *C. & P.* 537. But when the goods of a

corporation are stolen, they must be laid to be the property of the corporation, in their corporate name, and not in the names of the individuals who compose it; *R.* v. *Patrick*, 2 *East*, *P. C.* 1059; 1 *Leach*, 253: and there is a difference upon this subject, between an ancient corporation and a corporation newly erected; an ancient corporation may by use have a special name differing in substance from that by which they were originally incorporated, and they may plead and be impleaded by that name; but a corporation created within memory must plead and be impleaded by the name by which they were incorporated. *Hob.* 211: *Noy*, 54: 2 *Brownl.* 292: *Latch*, 229: 11 *Co.* 94: *Dy.* 279: 3 *Mod.* 6: *Cro. Eliz.* 351: 2 *Bac. Abr. Corp.* (C. 3): *and see* 10 *Co.* 87.

Provision is likewise made by stat. 7 *G.* 4, *c.* 46, *s.* 9, *and* 1 *&* 2 *Vict. c.* 85, for the description of property belonging to joint-stock banking co-partnerships; but we have seen (*ante p.* 34) that these provisions are, according to the better opinion, merely cumulative.

If a larceny be committed of goods and chattels provided for or at the expense of any county, riding, and division, they may be described as belonging to the inhabitants of such county, &c., without specifying the names of any. 7 *G.* 4, *c.* 64, *s.* 15. Goods and chattels provided for the use of the poor of any parish, township, or hamlet, to be used in the workhouse, or poor-house, or by the master or mistress thereof, or the workmen or servants therein, may be described as belonging to the overseers of the parish &c. for the time being, without specifying their names: or, if it be the workhouse of a union or parish under the operation of the 4 *&* 5 *Will.* 4, *c.* 76, as the property of the guardians of the poor of the union or parish. 5 *&* 6 *Will.* 4, *c.* 69, *s.* 7; 7 *G.* 4, *c.* 64, *s.* 16. So, materials, tools, or implements for making, altering, or repairing highways (not being turnpike roads) may be described as belonging to the surveyors of the highways of the parish &c. for the time being, without specifying their names. 7 *G.* 4, *c.* 64, *s.* 16. Property under turnpike trusts, materials, tools, or implements provided for making, altering, or repairing turnpike roads, may be described as belonging to the trustees or commissioners of such road, without specifying their names. 7 *G.* 4, *c.* 64, *s.* 17. And property under the management of the commissioners of sewers may be described as belonging to the commissioners of sewers within whose view, cognisance, or management it shall be, without specifying their names. 7 *G.* 4, *c.* 64, *s.* 18. The property of friendly societies may be described as the property of the treasurer or trustee, for the time being, in his proper name, without further description. 10 *G.* 4, *c.* 56, *s.* 21; *see* 4 *&* 5 *W.* 4, *c.* 40: *Reg.* v. *Wymer*, 4 *C. & P.* 391: *Reg.* v. *Cain*, 2 *Mood. C. C.* 204; *C. & Mar.* 309; *ante*, *p.* 35. Clothes, linen, or other goods belonging to the hospital at Chelsea, or the commissioners thereof, may be described as belonging to the "Lords and others, Commissioners of the royal hospital for soldiers at Chelsea, in the county of Middlesex." 7 *G.* 4, *c.* 16, *s.* 31. Monies or valuable securities, embezzled by persons in the public-service, may be described as the property of the Queen. 2 *W.* 4, *c.* 4, *s.* 4. And post letters, &c., &c., stolen or fraudulently retained, may be described as the property of the Postmaster-General. 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 40.

*Feloniously.*]—The taking and carrying away must be felonious,

that is, done *animo furandi;* or, as the civil law expresses it, *lucri causâ*, 4 *Bl. Com.* 232. This, indeed, is not very definite; but larceny, so far as respects the intent with which it is committed, (and the intent here is a material ingredient to the offence), may perhaps correctly be defined thus: where a man knowingly takes and carries away the goods of another, without any claim or pretence of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use. If the sheep of A. stray into the flock of B., and B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another. 1 *Hale*, 506. If, under colour of arrear of rent, although none be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony. 1 *Hale*, 509. If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be. *Ib.* If a servant take his master's horse without his knowledge, and bring him home again; if a man take his neighbour's plough that is left in a field, and use it upon his own land, and then return it; these may be trespasses, but are not felonies, 1 *Hale*, 509, because the returning the thing taken sufficiently evinces that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; for if it appear that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence. *See* 1 *Hawk. c.* 34, *s.* 2: 1 *Hale*, 533. In *R.* v. *Phillips*, 2 *East*, *P. C.* 662, 663, it was proved that the defendants took two horses out of the prosecutor's stable at night without his leave, and having rode them about 30 miles, left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken on the same day, at the distance of 14 miles from the inn, walking in a direction from it: the jury found the defendants guilty, but at the same time found specially that the defendants meant merely to ride the horses the thirty miles, and to leave them there, without an intention to return for them, or otherwise dispose of them; and ten of the judges held that this was no felony, as there was no intention in the prisoners to change the property, or make it their own. So, where, upon an indictment for larceny, it appeared that the prisoner had clandestinely taken the goods alleged to have been stolen from a young woman, for the mere purpose of inducing her to call for them, that he might have an opportunity of soliciting her to commit fornication with him, the judges held this not to be a felonious taking. *R.* v. *Dickinson*, *R.* & *R.* 420. So, where the captain of a ship taken as a prize secreted some of the cargo, and clandestinely removed it from the ship, it being doubtful whether he did so for his own benefit or for that of his owners, he was recommended for a free pardon; but the majority of the judges were of opinion that if the goods had been secreted for his own benefit, it would have amounted to larceny. *R.* v. *Van Muyen*, *R.* & *R.* 118. And where a person stole certain articles, and also took a horse, not with an intention to steal it, but merely to get off more conveniently with the property, this was holden not to be a felonious stealing of the horse. *R.* v. *Crump*, 1

*C. & P.* 658. Where the prosecutor met the prisoner, whom he knew to be a poacher, and seized him, and the prisoner, being rescued, seized the gun of the prosecutor, and ran away with it, and subsequently was heard to say that he would sell it, and the gun was never afterwards heard of, *Vaughan*, B., upon an indictment for stealing the gun, told the jury that it would not be felony if the prisoner took the gun under an impression at the time that it might be used so as to endanger his life, and not with an intention of disposing of it, although he might afterwards have determined to dispose of it; and the jury, being of opinion that he had no intention of disposing of the gun at the time he took it, acquitted the prisoner. *R.* v. *Holloway*, 5 *C. & P.* 524. Where A., at the instigation of a police officer, concerted with three persons to commit a felony, in order that the officer might apprehend them, and upon their conviction receive the reward, which was to be divided between the officer and A., and A. with the others did commit the felony, it was holden by the majority of the judges that A. had not the felonious intention necessary to make him a principal, although he acted from a bad motive, namely, the reward, because he was present not to aid and assist, but to detect, and had no intention that the felony should be successful. *R.* v. *Dannelley*, *R. & R.* 310; 2 *Marsh.* 571. There are cases, however, which go to establish that it is not necessary that the taking should be *lucri causâ*, if it be fraudulent, and with intent wholly to deprive the owner of the property. Thus, where a prisoner, to screen his accomplice, who was indicted for horse-stealing, broke into the prosecutor's stable, and took away the horse, which he backed into a coal-pit and killed, and it was objected at the trial that this was not larceny, because the taking was not with an intention to convert the horse to the use of the taker, *animo furandi et lucri causâ*; seven of the judges held that it was larceny, and six of that majority were of opinion, that, to constitute larceny, it was not essential that the taking should be *lucri causâ*, if it be fraudulent, and with intent wholly to deprive the owner of the property; but some of this majority thought that the object of the prisoner might be deemed a benefit, and the taking *lucri causâ*. *R.* v. *Cabbage*, *R. & R.* 292. Again, where the prisoners, servants in husbandry, open the granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, in addition to the quantity usually allowed, this was holden larceny by a majority of the judges: but it was alleged by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses; and therefore the *lucri causâ*, to give themselves ease, was an ingredient in the offence. *R.* v. *Morfit*, *R. & R.* 307. *See Reg.* v. *Gruncell*, 9 *C. & P.* 365; *Reg.* v. *Handley*, *C. & Mar.* 547. So, where the defendant was supplied by his master with pig-iron, to be put into a furnace to be melted, being paid according to the weight of the metal which ran out of the furnace into bars, and he put in also other iron belonging to his master, whereby, the weight of the melted iron being thus increased, he gained a larger remuneration, it was held that if he did this with the felonious intent of converting the iron to a purpose for his own profit, it was a larceny. *Reg.* v. *Richards*, 1 *C. & K.* 532.

In all cases of larceny, the questions, whether the defendant took the goods knowingly or by mistake—whether he took them *bonâ*

*fide* under a claim of right, or otherwise—and, whether he took them with an intent to return them to the owner, or to deprive the owner of them altogether, and to appropriate or convert them to his own use—or fraudulently, and to deprive the owner of them altogether—are questions entirely for the consideration of the jury, to be determined by them, upon a view of the particular facts of the case.

*Take.*]—There must be a taking of the goods, either actual or constructive, in order to constitute larceny. Therefore, if a wife carry away and convert to her own use the goods of her husband, it is no larceny, for husband and wife are one person in law, and consequently there can be no taking so as to constitute larceny; 1 *Hale*, 514; and the same if the husband be jointly interested with others in the property so taken. *R.* v. *Willis*, 1 *Mood. C. C.* 375. So, if a man take his own goods, it is no larceny, unless they be in the hands of a bailee, and the taking of them have the effect of charging the bailee. Where thirty bales of nux vomica, which paid no duty upon exportation, but a large duty if intended for home consumption, deposited by A. with B., who gave the usual bond to the custom-house, were sent by B., under the care of C., to be shipped on board a foreign vessel for exportation, and A., by collusion with C., took the nux vomica from the bales, substituted cinders for it, and shipped the bales on board the vessel, this was holden, by a majority of the judges, to be larceny, because the taking rendered B. chargeable to the custom-house, and liable to a suit upon his bond. *R.* v. *Wilkinson*, *R. & R.* 470. So, if there be joint tenants or tenants in common of a personal chattel, and one of them carry away and dispose of it, this is no larceny; 1 *Hale*, 513; there is in fact no taking, for he is already in possession; it is merely the subject of an action of account, or bill in equity. But if he were to take it out of the possession of a person in whose hands it was for safe custody, and the effect of the taking would be to charge the bailee, it would be otherwise; as where a member of a benefit society entered the room of the person with whom a box containing the funds of the society was deposited, and took and carried it away, this was holden to be larceny, the bailee being answerable to the society for the funds. *R.* v. *Bramley*, *R. & R.* 478.

If a man lose goods, and another find them, and, not knowing the owner, convert them to his own use, this is said to be no larceny, 3 *Inst.* 108; 1 *Hawk. c.* 33, *s.* 2, even although he deny the finding of them, or secrete them. 1 *Hale*, 506. But this doctrine must be taken with great limitation, and can only apply where the finder *bonâ fide* supposes the goods to have been lost, or abandoned by the owner, and not to a case in which he colours a felonious taking under that pretence. *Id.* 2 *East*, *P. C.* 664: *Reg.* v. *Kerr*, 8 *C. & P.* 176: *Reg.* v. *Reed*, *C. & Mar.* 306: *Reg.* v. *Peters*, 1 *C. & K.* 245: *Reg.* v. *Mole*, *Id.* 417. It is clearly otherwise, if he know the owner: and therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it, which he kept and converted to his own use, it was holden to be a larceny. *Cartwright* v. *Green*, 8 *Ves.* 405: 2 *Leach*, 952. So, if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is felony, if he know the owner, or if he took him up or set him down at any particular

place where he might have inquired for him. *R.* v. *Wynne*, 2 *East*, *P. C.* 664; 1 *Leach*, 413: *R.* v. *Lamb*, 2 *East*, *P. C.* 665: *R.* v. *Sear*, 1 *Leach*, 415, *n.* Where a person purchased at an auction a bureau, in which he afterwards discovered, in a secret drawer, a purse of money, which he appropriated to his own use; it was held, that if he had express notice that the bureau only, and not its contents, if any, was sold to him, or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny; but that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny. *Merry* v. *Green*, 7 *M. & W.* 623. And in every case in which there is any mark upon the property by which the owner may be traced, and the finder, instead of restoring the property, converts it to his own use, such conversion will amount to larceny. *R.* v. *James*, 2 *Russ.* 12: *R.* v. *Pope*, 6 *C. & P.* 346: *Reg.* v. *Mole*, *suprà.*

We have just said that the taking may be actual or constructive: actual, where the goods have been actually taken out of the owner's possession, against his will or without his consent, and which requires no further comment or illustration: constructive, where the owner delivers the goods, but either he does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud, and in pursuance of a previous intent to steal them. As this subject of constructive possession has given rise to some very nice distinctions, it may be necessary to consider it with some minuteness: I shall therefore class the cases decided upon it under the following heads:—1. Where, by the delivery, the owner of the goods passes not only the possession, but the right of property also. 2. Where the possession has been obtained *animo furandi.* 3. Where the possession was originally obtained *bonâ fide*, and without a felonious intent. 4. Where the delivery does not alter the possession in law.

*First.* As to the cases, where, by a delivery of the goods, not only the possession, but the right of property also, passes.—It is clear that no subsequent conversion, by the person in whom the right of property has thus vested, can be construed into larceny, whatever the intent of the party may be. As, for instance, where goods are sold upon credit and delivered, no conversion of them by the vendee can amount to larceny. Where the defendant bought a horse at a fair of the prosecutor, to whom he was known, and having mounted the horse, said to the prosecutor that he would return immediately and pay him, to which the prosecutor answered, "Very well;" the defendant rode the horse away, and never returned; this was holden to be no larceny, because the property, as well as the possession, was parted with. *R.* v. *Harvey*, 1 *Leach*, 467; 2 *East*, *P. C.* 669. So, where the defendant bought goods, and desired them to be sent to him with a bill and receipt, and the shopman who brought them left them, upon being paid for them by two bills, which, however, afterwards turned out to be mere fabrications; the judges held that this was not larceny, because the prosecutor had parted with the property, as well as the possession, upon receiving what was deemed at the time by his servant to be payment. *R.* v. *Parkes*, 2 *Leach*, 614; 2 *East*, *P. C.* 671. Where the servant of a pawnbroker, who had a

general authority from his master to act in his business, delivered up a pledge to the pawner upon receiving a parcel, which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was holden to be no larceny. *R.* v. *Jackson*, 1 *Mood. C. C.* 119. So, where the defendant sent to a hatter, in the name of one of his customers, for a hat, and it was accordingly delivered to the messenger upon the credit of the customer; the judges held that this was not larceny, the owner having parted with his property in the hat. *R.* v. *Adams*, *R. & R.* 225. So, where a woman obtained from the prosecutor, in the name of one of his neighbours, half-a-guinea's worth of silver, and said that she would return presently with the half guinea, it was holden not to be larceny, for the same reason. *R.* v. *Coleman*, 8 *East*, *P. C.* 672. So, where A. allowed B. to take a sovereign away to get change for it, and he never returned, this was held no larceny of the sovereign. *Reg.* v. *Thomas*, 9 *C. & P.* 741. So, where the defendant sent a letter to the prosecutor in the name of another person, requesting a loan of 3*l.* for a few days, and obtained the money accordingly; eleven of the judges held this to be no felony, because it appeared that the property in the money was intended to pass by the delivery. *R.* v. *Atkinson*, 2 *East*, 673. And where the prosecutor was inveigled by a set of sharpers to bet with them, and, by a preconcerted trick, one of them won from him the money in question, which he paid, imagining it to have been won fairly: the judges held that this was no larceny, the prosecutor having parted with his property in the money under an idea that it had been fairly won. *R.* v. *Nicholson*, 2 *Leach*, 610.

*Secondly.* Where the possession of the goods has been obtained *animo furandi.*—Where a man, having the *animus furandi*, (*see ante*, *p.* 178), obtains, in pursuance thereof, possession of the goods by some trick or artifice, this is considered such a taking (even although there be a delivery in fact) as to constitute larceny. Where the defendant offered to give the prosecutor gold for bank notes, and, upon the prosecutor's laying down some bank notes for the purpose of having them changed for gold, the defendant took them up, and went away with them, promising to return immediately with the notes, but never in fact returned: *Wood*, B., left it to the jury to say, whether the defendant had the *animus furandi*, at the time he took the notes, and said, that if they were of that opinion, the case clearly amounted to larceny. *R.* v. *Oliver*, 4 *Taunt.* 274, *cit.* 2 *Leach*, 1072: *see Reg.* v. *Rodway*, 9 *C. & P.* 784. Where the defendant agreed to discount a bill for the prosecutor, and the bill was given to him for that purpose; he told the prosecutor that if he then sent a person with him to his lodgings, he would give him the amount, deducting the discount and commission; a person was sent accordingly, but, upon reaching the lodgings, the defendant left the messenger there, and went out on pretence of getting the money, but never returned: the judge left it to the jury to say whether the defendant obtained possession of the bill with intent to steal it, and whether the prosecutor meant to part with his property in the bill, before he should have received the money for it: the jury being of opinion in the affirmative on the first proposition, and in the negative on the second, convicted the prisoner, and the judges afterwards held the conviction to be right. *R.* v. *Aickles*, 2 *East*, *P. C.* 675;

1 *Leach*, 294. Where the defendant obtained from a silversmith two cream ewers, in order that a customer of the silversmith, with whom the defendant said he lived, might select which he liked best, and absconded with them, but the silversmith did not charge for either of the ewers, and did not at the time of the delivery intend to charge for either of them until he had ascertained which would be chosen, this was holden by *Bayley*, J., to be larceny, because the possession only, and not the right of property, had been parted with; *R.* v. *Davenport*, *MS.*, 1 *Arch. Peel's Acts*, 5; but if the prisoner had in fact been sent by the customer to the silversmith, the possession would have been in the prisoner, and the subsequent conversion would not have been larceny; and, upon this ground, in a case similarly circumstanced, but in which there was no evidence that the prisoner had not actually been sent for the goods, *Patteson*, J., directed an acquittal; for, *non constat* that the prisoner had not been sent for the goods as she had stated, and had delivered them to the person who sent her. *R.* v. *Savage*, 5 *C. & P.* 143. Where the defendant prevailed upon a tradesman to take goods to a particular place, under pretence that the price would then be paid for them, and afterwards induced him to leave the goods in the care of a third person, from whom the defendant got the goods without paying the price; the tradesman swore that he did not intend to part with the goods until they were paid for, and the jury found that the defendant, *ab initio*, intended to get the goods without paying for them: this was holden to be larceny. *R.* v. *Campbell*, 1 *Mood. C. C.* 179. So, where the defendant induced a tradesman to send his goods by a servant to a particular place, with change for a crown piece, and on the way met the servant, and giving him a counterfeit crown piece, induced him to part with the goods and change, which he had no authority to do without receiving payment; this was holden to be larceny. *R.* v. *Small*, 8 *C. & P.* 46. So, where the defendant having bargained for goods, for which by the custom of trade, the price should have been paid before they were taken away, took them away without the consent of the owner, and at the time he bargained for them did not intend to pay for them, but meant to get them into his own possession, and dispose of them for his own benefit; this was holden to be larceny. *R.* v. *Gilbert.* 1 *Mood. C. C.* 185. And where the defendant, intending *ab initio* to get goods by fraud, had them put into his cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them: this was holden to be larceny. *R.* v. *Pratt*, 1 *Mood. C. C.* 250. So, obtaining money or goods by the practice of *ring-dropping*, (as it is termed), has been holden to be larceny. Thus, where the defendant, in the presence of the prosecutor, picked up a purse in the street, containing a receipt for 147*l.* for a "*rich brilliant diamond ring*," and also the ring itself; it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10*s.* only, and the watch and money were never returned; it was

left to the jury to say, whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury being of that opinion, convicted the defendant. *R.* v. *Patch*, 1 *Leach*, 238. *In R.* v. *Moore*, 1 *Leach*, 314; 2 *East, P. C.* 679, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion, that this practice of ring-dropping amounted to larceny; and they distinguished it from the case of a loan; for here, although the possession was parted with, the property in the goods was not. *See R.* v. *Watson*, 2 *Leach*, 640; 2 *East, P. C.* 680, *S. P. by all the judges.* Where the defendant, in the presence of the prosecutor, picked up a purse containing a watch-chain and two seals, which the defendant and his confederate represented to be gold, and worth 18*l.*, and the prosecutor purchased the defendant's share for 7*l.*, intending to part with the property in the money as well as the possession of it; *Coleridge*, J., held that this was not larceny. *Reg.* v. *Wilson*, 8 *C. & P.* 111. Where the defendants decoyed the prosecutor into a public-house, and then introduced the play of cutting, and one of them prevailed upon the prosecutor, who did not play on his own account, to cut the cards for him; and then, under the pretence that the prosecutor had cut the cards for himself, and lost, another of them swept his money off the table, and went away with it, it was considered to be a case in which it should be left to the jury to determine *quo animo* the money was obtained; and which would be a felony, should they find that the money was obtained upon a preconcerted plan to steal it. *R.* v. *Horner*, 1 *Leach*, 270; *Cald.* 295. So, where the prosecutor was induced, by a preconcerted plan, to deposit his money with one of the defendants, as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; and it was left to the jury to say, whether, at the time the money was taken, there was not a plan that it should be kept, under the false colour of winning the bet, and the jury found that there was; this was held to be larceny; because, at the time the defendants obtained the money from the prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party really won the wager. *R.* v. *Robson*, *R. & R.* 413. Where the prisoner went into a shop and asked for change for half-a-crown, and the shopman gave him two shillings and sixpence, the prisoner held out the half-crown, and the shopman just took hold of it by the edge, but never actually got it into his custody, and the prisoner ran away with the change and the half-crown; upon an indictment for stealing the two shillings and sixpence, *Parke*, J., held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown. *R.* v. *Williams*, 6 *C. & P.* 390. Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodgings, out of which the defendant chose six pairs, which were laid on the back of a chair; the defendant then sent the prosecutor back to his shop for some articles, and while he was absent, absconded with the stockings; the judges held, that this amounted to larceny, the defendant having clearly obtained possession of the goods *animo furandi*. *R.* v. *Sharpless*, 1 *Leach*, 93; 2 *East, P. C.* 675. Where the defendant hired a horse from the prosecutor, on pretence of taking a journey, and it turned out, that,

instead of going the journey, he sold the horse in Smithfield market on the same day; it was left to the jury to consider, whether he hired the horse for the purpose of stealing it, or whether he hired it really for the purpose of taking the journey, and afterwards changed his intention; and the jury, being of the former opinion, found him guilty: seven of the judges were afterwards clearly of opinion that the offence was felony. *R.* v. *Pear*, 1 *Leach*, 212; 2 *East*, *P. C.* 685. *See R.* v. *Banks*, *R.* & *R.* 441; *post*, *p.* 189. And the same where the defendant hired the horse in the name of another person. *R.* v. *Charlewood*, 1 *Leach*, 409; 2 *East*, *P. C.* 689. So, where the defendant hired a post-chaise, with intent to convert it to his own use, and never returned it; upon being indicted for it, twelve months afterwards, as for a larceny, it was holden clearly to amount to that offence, although the chaise was not hired for any definite time. *R.* v. *Semple*, 1 *Leach*, 420; 2 *East*, *P. C.* 691. There must, however, in order to constitute a larceny by a party to whom the goods have been delivered on hire, be not only an original intention to convert them to his own use, but a subsequent actual conversion; and a mere agreement by the hirer to accept a sum offered for the goods by a third party, who however did not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell were removed, was held not to amount to such a conversion. *Reg.* v. *Brooks*, 8 *C.* & *P.* 295. In *Semple's case*, *supra*, the subsequent conversion was presumed from the long lapse of time, and the other circumstances of the case, although the chaise was not proved to have been actually disposed of by the defendant. Where the prisoner went to an inn, on a fair-day, and desired the ostler to bring out his horse, and upon the latter saying that he did not know which was his horse went into the stable, and pointing to a mare, said it was his, and the ostler brought out the mare, which the prisoner attempted to mount but could not, the mare being frightened; upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured: *Garrow*, B., held this to be larceny. *R.* v. *Pitman*, 2 *C* & *P.* 423. If a man, *animo furandi*, sue out a replevin, and by that means obtain the possession of another man's horse, and ride away with it; or by a fraudulent ejectment to get possession of another's house, and carry away the goods out of it, he is guilty of larceny. 1 *Hale*, 507: 1 *Hawk. c.* 83, *s.* 12: 3 *Inst.* 108: *and see R.* v. *Farr*, *Kel.* 43; 2 *Leach*, 1064, *n.* Where the defendant, *animo furandi*, obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed, it was holden to be larceny; because the servant had no authority to part with the goods but to the right person. *R.* v. *Longstreeth*, 1 *Mood. C. C.* 137. So, where the prosecutor, intending to sell his horse, sent his servant with it to a fair, but the servant had no authority to sell or deal with it in any way, and the defendant by fraud induced the servant to part with the possession of the horse, under colour of an exchange for another, intending all the while to steal it; this was holden to be larceny. *Reg.* v. *Sheppard*, 9 *C.* & *P.* 121. Where the defendant, by artifice, obtained possession of a request note at the India House, by means of which he obtained a permit for a chest of tea belonging to the prosecutor, (to whom he was a perfect stranger), and the chest of tea was thereupon delivered to him: the judges held this to be larceny, not-

withstanding the possession had been obtained by means of a regular request note and permit. *R.* v. *Hench, R.* & *R.* 163. A hosier in the Haymarket, having sent his apprentice with a parcel of stockings to Cheapside, the defendant met him on Ludgate Hill, and asked him where he was going; the apprentice answered, to Mr. Heath's; the defendant replied, that he was the person, desired the boy to give him the parcel, and gave him a small parcel in return, to take home to his master; the boy accordingly gave him the parcel; but the parcel he took from him for his master contained nothing but old rags, of no value: the judges held this to be larceny. *R.* v. *Wilkins,* 1 *Leach,* 520; 2 *East, P. C.* 673. It must be owned, that these two last cases so nearly resemble a few of the latter cases collected under the first head, that the reader will probably feel some difficulty in distinguishing them upon principle. They may be considered as very nearly approaching the boundary which separates the one class of cases from the other. In such cases, it is safer and more prudent to indict the defendant for obtaining goods, &c., by false pretences; the punishment is nearly the same as for simple larceny; and if upon an indictment for obtaining goods, &c., by false pretences, it be proved that the defendant obtained the goods, &c. under circumstances which in law amount to larceny, he will not, upon that ground, be entitled to an acquittal. 7 & 8 *G.* 4, *c.* 29, *s.* 53.

*Thirdly.* As to the case where the possession of the goods has been obtained *bonâ fide,* without any fraudulent intention in the first instance.—Where goods are delivered to a man upon trust, or taken by him with the owner's consent, he is not guilty of larceny by converting them to his own use. Even if the goods of a husband be taken with the consent or privity of the wife, it is not larceny. *R.* v. *Harrison,* 1 *Leach,* 47. However, it is said, that if a woman steal the goods of her husband, and give them to her avowterer, who, knowing it, carries them away, the avowterer is guilty of felony; *Dalt. c.* 104: and where a stranger took the goods of the husband, *jointly* with the wife, this was holden to be larceny in him. *R.* v. *Tolfree,* 1 *Mood. C. C.* 243: and so it is even though no adultery have then been committed, but the goods are taken with the intent that the wife shall elope and live in adultery with the stranger. *Reg.* v. *Tollett, C.* & *Mar.* 112: *see,* however, *R.* v. *Clark, R.* & *R.* 376, *n.* But an adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his home, in which the adultery is afterwards committed, merely upon evidence of their being there, unless they be traced to his personal possession. *Reg.* v. *Rosenberg,* 1 *C.* & *K.* 233. Where the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings; but the next morning she concealed them, and denied having them in her possession: the jury finding that she took them originally merely from a desire of saving them for, and returning them to, the prosecutor, and that she had no evil intention till afterwards, the judges held that it was a mere breach of trust, and not a felony. *R.* v. *Leigh,* 2 *East, P. C.* 694. So, where a letter, directed to J. M., St. Martin's Lane, Birmingham, inclosing a bill of exchange drawn in favour of J. M., was delivered to the defendant, whose name was J. M., and who resided near St. Martin's Lane, Birmingham; but in truth the letter was intended for a person of the name of J. M., who resided in New Hall Street;

and the prisoner, who from the contents of the letter must have known that it was not intended for him, applied the bill of exchange to his own use; the judges held that it was no larceny, because, at the time when the letter was delivered to him, the defendant had not the *animus furandi*. *R.* v. *Mucklow*, 1 *Mood. C. C.* 160. If A. lend B. a horse, and he ride away with him, or if I send goods by a carrier, and he carry them away; or if any other bailee convert the goods bailed to his own use, it is not larceny; because the original taking was *bonâ fide*; and without fraud. 1 *Hale*, 504 : 1 *Hawk. c.* 33. *s.* 2. So, if A. *bonâ fide* hire a horse for a particular purpose, and, after that purpose is accomplished, sell the horse, it is no larceny: for, unless he had an original felonious intention, the subsequent withholding or disposing of the horse does not constitute a new felonious taking. *R.* v. *Banks*, *R. & R.* 441, *overruling R.* v. *Tunnard*, 2 *East, P. C.* 687. So, if A. deliver to B. a watch to be repaired, and B. sell it, it is not larceny, because it was delivered voluntarily, and not obtained *animo furandi*. *R.* v. *Levy*, 4 *C. & P.* 241. So, if A. deliver to B. a horse to be agisted, and B. sell it, this is no larceny. *R.* v. *C. Smith*, 1 *Mood. C. C.* 473. But this rule can only obtain in cases in which the possession is obtained *bonâ fide* in the first instance; for if A. obtain goods *animo furandi*, or receive them, harbouring at the time an intention wrongfully to convert them to his own use, it is larceny. Thus, where the defendant was employed to drive sheep to a fair, but, instead of driving them to the fair, he drove them in a contrary direction, and sold ten of them on the morning he received them; and the jury were of opinion, that, at the time he received them, he intended to convert them to his own use; this was holden to be larceny. *R.* v. *Stock*, 1 *Mood. C. C.* 87. *See R.* v. *M'Mane*, 1 *Mood. C. C.* 368 : *Reg.* v. *Goodbody*, 8 *C. & P.* 665 : *Reg.* v. *Harvey*, 9 *C. & P.* 353; *Reg.* v. *Evans*, *C. & Mar.* 632. The rule also applies only while the contract of bailment continues; for if that be determined, and the conversion take place afterwards, it will amount to larceny. As, for instance, if a carrier take goods to the place appointed, and afterwards take them away and convert them, it will amount to larceny. 3 *Inst.* 107. So, the contract may be determined before its regular completion, by the tortious act of the bailee. Thus, if a carrier open a bale or pack of goods, or pierce a vessel of wine and take away part thereof, he is guilty of larceny; 3 *Inst.*, 107; 1 *Hale*, 105; for by this tortious act the contract of bailment is determined. *Id.; and see Kel.* 82, 83. Where forty bags of wheat were sent, for safe custody, to a warehouseman, who emptied several of the sacks, sold the wheat, and substituted other wheat of inferior quality, the judges were unanimously of opinion, that the taking the whole of the wheat out of one sack was as much a larceny as the taking a part merely. *R.* v. *Brazier*, *R. & R.* 337. Where a captain, in whose ship several casks of butter were stowed, the principal number being in the hold, battened down, but some were on deck, being driven into port by stress of weather, sold, as his own, some of the casks which were on deck, and, upon arriving at his destination, told the consignee that the casks had been thrown overboard, the judges held this to be no larceny; but it seemed to be admitted, that if the defendant had broken bulk by taking the casks from the hold, it would have been otherwise. *R.* v. *Madox*, *R. & R.* 92. A., the owner of a boat,

was employed by B., the captain of a ship, to carry a number of staves ashore in his boat; but B.'s men were put in the boat, but were under the control of A., who did not deliver all the staves, but carried one to the house of his mother, and it was held by *Patteson*, J., that this amounted to a bailment to A., so as to excuse him of the larceny if he had not delivered any of the staves, but that the separation of one stave with intent to convert it to his own use was a breaking of bulk, and so amounted to larceny. *R.* v. *Howell*, 8 *C. & P.* 325. So, where a person, not being the servant of the prosecutor, received from him a parcel containing notes to take to a coach-office, and on the way he abstracted the notes, and applied them to his own use, he was holden guilty of larceny. *Reg.* v. *Jenkins*, 9 *C. & P.* 38. If he who is employed to carry goods for hire appropriate them to his own use without breaking bulk, it is no larceny, even though he be not a common carrier, but be employed in the particular instance only. *R.* v. *Fletcher*, 4 *C. & P.* 545: *R.* v. *Pratley*, 5 *C. & P.* 533.

*Fourthly.* As to cases where, although there is a delivery of the goods by the owner, yet the possession in law remains in him.—If a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny at common law; 1 *Hale*, 506; because the goods, at the time they are taken, are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master. Where a person employed to drive cattle, or to take them to a particular place for a special purpose, and bring them back, sells them, it is larceny; for he has the custody merely, and not the right to the possession; *R.* v. *M'Mane*, 1 *Mood. C. C.* 368; although the intention to convert them were not conceived until after they were delivered to him. *Reg.* v. *Harvey*, 9 *C. & P.* 353: *Reg.* v. *Jackson*, 2 *Mood. C. C.* 32: *see Reg.* v. *Goode*, *C. & Mar.* 582: *Reg.* v. *C. Jones*, *Id.* 611: *Reg.* v. *Frances Smith*, 1 *C. & K.* 423. Where the defendant, who was carter to the prosecutor, went away with and disposed of his master's cart, it was holden to be felony. *R.* v. *Robinson*, 2 *East*, *P. C.* 565. Where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them, the judges held this to be felony. *R.* v. *Bass*, 2 *East*, *P. C.* 566. The defendant, foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the day-time, received from his master a bill of exchange, with directions to send it inclosed in a letter to J. S. in London; the defendant absconded with the bill; and the judges held this to be felony. *R.* v. *Paradice*, 2 *East*, *P. C.* 565. So, if money, or a valuable security (as a cheque drawn by the prosecutor on a banker, *Reg.* v. *Heath*, 2 *Mood. C. C.* 33) be given by a master to his servant to carry to another, or to purchase goods with, and the servant apply it to his own use, it is larceny. *R.* v. *Lavender*, 2 *Russ.* 160: *Reg.* v. *Beaman*, *C. & Mar.* 595. So, if a man, having purchased corn on board a vessel, send his clerk or lighterman with a barge for the purpose of landing it, and the clerk or lighterman embezzle a part of it, this is larceny. *R.* v. *Abrahat*, 2 *Leach*, 824: *R.* v. *Spear*, 2 *Leach*, 825; 2 *East*, *P. C.* 568. So, where the servant of a master carman, employed to cart goods, by collusion with others,

suffered the goods, with the cart, to be taken away, it was holden to be larceny in the servant; and to be immaterial whether the property were laid in the bailee or the original owner. *R.* v. *Harding*, *R.* & *R.* 125. So, where a servant got ten guineas from her master, in order to get silver for them, and, instead of doing so, ran away with the guineas, it was holden to be larceny. *R.* v. *Atkinson*, 1 *Leach*, 302. Even where a confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange, unindorsed, got it discounted, and absconded with the produce of it, it was holden to be felony. *R.* v. *Chipchase*, 2 *Leach*, 699; *and see R.* v. *Murray*, 1 *Leach*, 344. Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself by certain bank notes, entering the payment in the book as being made to "a man:" this was holden by the judges to be a larceny of the bank notes. *R.* v. *Hammon*, *R.* & *R.* 221; 2 *Leach*, 1083; 4 *Taunt.* 304. So, if a sheriff's officer clandestinely sell, for his own use, part of the goods which he has seized under a *fi. fa.*, he is guilty of larceny, because he has the custody of the goods merely, like a servant, and has not the legal possession. *R.* v. *Eastall*, 2 *Russ.* 197. An unauthorized *gift* by the servant of his master's goods is as much a felony as if he sold or pawned them. *Reg.* v. *White*, 9 *C.* & *P.* 344. And where a third party receives goods from a servant, under colour of a pretended sale, knowing that the servant has no authority to sell them, and is in fact defrauding his master, this is larceny in both. *Reg.* v. *Hornby*, 1 *C.* & *K.* 305. But where goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant, instead of delivering them to his master, by depositing them in his house, or the like, converts them to his own use, this is holden to be no larceny at common law. 2 *East*, *P. C.* 568. Therefore, if a shopman receive money from a customer of his master, and, instead of putting it into the till, secretes it, *R.* v. *Bull*, 2 *Leach*, 841, *cit.*; or, if a banker's clerk receive money at the counter, and, instead of putting it into the proper drawer, purloin it, *R.* v. *Bazeley*, 2 *Leach*, 835, or receive a bond for the purpose of being deposited in the bank, and instead of depositing it, convert it to his own use; *R.* v. *Waite*, 1 *Leach*, 28; 2 *East*, *P. C.* 570; in these cases, it has been holden, that the clerk or shopman is not guilty of larceny. So, where a servant was sent by his master to get silver for a 5*l.* note, which he did, and absconded with the silver, it was holden no larceny, because the silver had never been in the possession of his master, except by the hands of the servant. *R.* v. *Sullens*, 1 *Mood. C. C.* 129. And where the prosecutor, having employed the defendant to purchase Exchequer Bills for him, gave him a cheque upon his bankers for the amount, and the defendant received the amount of the cheque in bank notes, and absconded, it was holden not to amount to a larceny of the notes, because the prosecutor never had possession of them except by the hands of the defendant. *R.* v. *Walsh*, *R.* & *R.* 218. What is a sufficient delivery to the master for this purpose, must depend upon the nature of the goods. Thus, the putting down, by the servant, of a load of hay, which the master had sent him for, at the master's

stable door, was held a sufficient delivery to the master to make the servant guilty of larceny in then appropriating a part of it to his own use. *Reg.* v. *Hayward*, 1 *C.* & *K.* 508. There is a distinction between servants and bailees, which it may be necessary to mention in this place; if, for instance, a weaver or silk-throwster deliver yarn or silk to be wrought by his journeymen in his house, and they carry it away, and convert it to their own use, this is larceny: but if to be wrought out of the house, it is not; for the journeymen in that case are considered bailees, not servants. *See* 2 *East, P. C.* 682, 683.

If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery; and if the person to whom he has so delivered them make away with them and convert them to his own use, he will be guilty of larceny. 2 *East, P. C.* 683, 684; 1 *Hawk. c.* 33, *s.* 2. As, for instance, if the owner give the goods to a man to carry, and accompany him at the same time—if the man run away with the goods, he is clearly guilty of larceny.

So, if a man have a bare use of the goods of another, this does not divest the owner of the possession in law; and if the person, who thus has the use of them, fraudulently convert them, it is larceny. As, for instance, if a guest rob his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use. 1 *Hale*, 506; 1 *Hawk. c.* 33, *s.* 6.

It may be necessary to add, that although the taking must, in strictness, be *invito domino*, yet, where a servant, being solicited to become an accomplice in robbing his master's house, informed his master of it; and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come; it was holden that this conduct of the master was no defence to an indictment against the robbers. *R.* v. *Eggington*, 2 *B.* & *P.* 508; 2 *Leach*, 913: *see Reg.* v. *Williams*, 1 *C.* & *K.* 195.

Where a larceny is committed in one county, and the thief, at any distance of time, *R.* v. *Parkin*, 1 *Mood. C. C.* 45, carries the goods into another county, in contemplation of law he is guilty of, not only a carrying away, but also a taking, in every county through or into which the goods have been carried by him. 1 *Hale*, 507; 1 *Hawk. c.* 33, *s.* 52; 3 *Inst.* 113. So, if a larceny be committed in one part of the United Kingdom, and the goods be carried into another part of the United Kingdom, the offender may be indicted in that part of the United Kingdom into which the goods are carried. So, if a larceny be committed within 500 yards of the boundary of two counties, the defendant may be indicted in either county. And if committed upon any person, or with respect to any property, in or upon any coach, &c., or vessel, during the progress of a journey or voyage, the defendant may be indicted in any county in which, or by the boundary of which, the coach, &c., or vessel may pass during the progress of the journey or voyage. (*Ante, pp.* 24, 25).

*Carry away.*]—There must not only be a taking, but also a car-

rying away, in order to constitute larceny. A bare removal, however, from the place in which the thief found the goods, though he does not make off with them, is a sufficient asportation or carrying away. 4 *Bl. Com.*, 231. As, for instance, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, have removed them from his chamber down stairs; 3 *Inst.* 108, 109; or, if a servant *animo furandi*, take his master's hay from his stable, and put it into his master's waggon; *Reg.* v. *Gruncell*, 9 *C. & P.* 365: or if a thief, intending to steal plate, take it out of a chest in which it was, and lay it down upon the floor, but be surprised before he can make his escape with it; *R.* v. *Simpson*, *Kel.* 31; 1 *Hawk. c.* 33, *s.* 25; or if, intending to steal a cask of wine, he remove it from the head to the tail of the waggon in which it is placed, and be detected before he can effect his purpose of carrying it off. *R.* v. *Walsh*, 1 *Mood. C. C.* 14. And where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket; but, whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket: this was considered a sufficient asportation to constitute larceny. *R.* v. *Thompson*, 1 *Mood. C. C.* 78. But where the defendant merely set a package on end, in the place where it lay, for the purpose of cutting open the side of it to get out the contents, and was detected before he had accomplished his purpose; the judges held that this was not sufficient. *R.* v. *Cherry*, 2 *East, P. C.* 556. So, where the thief was not able to carry off the goods on account of their being attached by a string to the counter; *Anon.*, 2 *East, P. C.* 556; or to carry off a purse on account of some keys attached to the strings of it getting entangled in the owner's pocket; *R.* v. *Wilkinson*, 1 *Hale*, 508; the court in these cases held, that there was not a sufficient carrying away to constitute larceny: to render the asportation in such cases complete, there must be a severance. 2 *Russ.* 6.

## LARCENY BY CLERKS OR SERVANTS.

### *Statute.*

7 & 8 *Geo.* 4, *c.* 29, *s.* 46.]—For the punishment of depredations committed by clerks and servants in cases not punishable capitally, it is enacted, that if any clerk or servant shall steal any chattel, money, or valuable security, belonging to or in the possession or power of his master, every such offender, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

### *Indictment.*

*Commencement as ante, p.* 168.]—In the county aforesaid, was clerk ("*clerk or servant*") to J. N., and that the said J. S., afterwards, and whilst he was such clerk to the said J. N., as aforesaid, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, ten pieces of the current gold coin of the realm, called sovereigns, of the value of ten pounds; ten yards of linen cloth, of the value of ten shillings; and one bill of exchange, for the payment of ten pounds, and of the value of ten pounds, ("*any chattel, money, or valuable security,*" *see ante, p.* 175, *and post,* 214), of and belonging to the said J. N., his master, then and there being found, [*or,* in the possession and power ("*possession or power*") of the said J. N., his master, then and there being], then and there feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*You may add a count for larceny at common law, although this is unnecessary; and if it appear that the money, &c., was received by the clerk, &c., by virtue of his employment, on account of his master, and was not received into the possession of the master otherwise than by the actual possession of the clerk, &c., so as to be doubtful whether the offence strictly amounts to larceny, add a count for embezzlement, post.*

*Felony, transportation for not more than fourteen nor less than seven years, or imprisonment (with or without hard labour, and with or without solitary confinement, 7 & 8 G. 4, c. 29, s. 4, ante, p. 169, such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, ante, p. 169), for not more than three years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 G. 4, c. 29, s. 46.*

### *Evidence.*

Prove that the defendant, at the time he committed the offence, was "clerk or servant" to J. N., as alleged in the indictment; *see post, tit. Embezzlement.* The driver of a glass coach hired for the day is not the servant of the hirer, so as to come within the statute. *R.* v. *Haydon,* 7 *C. & P.* 445. *See Quarman* v. *Burnett,* 6 *M. & W.* 499. Then prove the larceny, as directed *ante, p.* 170—192; *see particularly p.* 189. Where, upon an indictment for larceny, it appeared that the defendant, being sent by his master to get change for a 5*l.* note, got silver for it and absconded, it was holden that it was not larceny, because the silver had never been in the possession of the master, except by the hands of the defendant. *R.* v. *Sullens,* 1 *Mood. C. C.* 129. But if the property be in the possession of the master, even by the hands of another clerk or servant, it is larceny. *R.* v. *Murray,* 1 *Mood. C. C.* 276. It is not required by the statute that the goods, &c., stolen should be the property of the master; the words of the statute are "belonging to or in the possession or power of the master."

STEALING OR KILLING HORSES, COWS, SHEEP, ETC.

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*Statutes.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 25]—Enacts, that, if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any such cattle, with intent to steal the carcase or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 1—*Punishment for Horse-stealing, &c.*]—*Recites the stat.* 2 *&* 3 *W.* 4, *c.* 62, *s.* 1, *which abolished the punishment of death in certain cases, (amongst others, the stealing "any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb," and also the wilful killing of any such cattle, with intent to steal the carcase or skin, or any part of the cattle so killed), and also the stat.* 3 *&* 4 *W.* 4, *c.* 44, *s.* 3, *which empowered the court in these and other cases to award imprisonment before transportation, and)* Enacts, that so much of the recited acts as relates to the punishment of persons convicted of offences for which they are liable under the stat. 2 *&* 3 *W.* 4, *c.* 62, to be transported for life, shall, from and after the commencement of this act, (1st October, 1837), be and the same are hereby repealed; and that, from and after the commencement of this act, every person convicted of any of such offences shall be liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years.

Sect. 3—*Place and Mode of Imprisonment*]—Enacts, that, in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet. (*See ante, p.* 169).

*Indictment for stealing Horses, Cows, Sheep, &c.*

*Commencement as ante, p.* 169]—one mare, ("*horse, mare, gelding, colt, or filly, bull, cow, ox, heifer, or calf, ram, ewe, sheep, or lamb*"), of the price of ten pounds, of the goods and chattels of one J. N., then and there feloniously did steal, take, and lead away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the indictment be for stealing a bull, &c., or sheep, &c., say* "drive away" *instead of* "lead away." *The indictment must give the animal one of the descriptions mentioned in the statute; otherwise the defendant can be punished as for simple larceny merely. R.* v. *Beaney, R. & R.* 416.

*Felony,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 25, *transportation for not more than*

*fifteen nor less than ten years, or imprisonment not exceeding three years, 7 W. 4 & 1 Vict. c. 90, s. 1, with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s. 3.*

*Evidence.*

Prove a larceny of the mare, &c., as directed *ante, p.* 170. *See R.* v. *Phillips, R.* v. *Crump, ante, p.* 180: *R.* v. *Cabbage, ante, p.* 181: *R.* v. *Harvey, ante, p.* 183: *R.* v. *Pear, R.* v. *Charlewood, ante, p.* 187: *R.* v. *Banks, R.* v. *Stock, R.* v. *C. Smith, ante, p.* 189. Where the defendant removed sheep from the fold into the open field, killed them, and took away the skins merely; the judges held, that removing the sheep from the fold was a sufficient driving away to constitute larceny. *R.* v. *Rawlins,* 2 *East, P. C.* 617. But where, upon an indictment for sheep-stealing, the evidence was that the carcases of the sheep were found lying in the gripe of a ditch, killed, and the tallow and fat taken away, the judges held that the removal of the sheep to the ditch for the purpose of killing them was not such a removal as would constitute a larceny of them within the meaning of the statute. *R.* v. *Williams,* 1 *Mood. C. C.* 107. (*See the next precedent*). Upon the trial of an indictment for horse-stealing, the prosecutor stated that he had agisted the horse on the land of another at some distance, and that, hearing from that person of the loss of the horse, he went to the field where the horse had been put to feed, and discovered that he was gone; but neither the agistor nor his servant was called as a witness: *Gurney,* B., held, that this was not sufficient evidence against the prisoner, for it was not shewn that he might not have obtained possession of the horse honestly. *R.* v. *Yend,* 6 *C. & P.* 176.

The evidence must correspond with the description of the animal in the indictment. If the animal stolen be specifically mentioned in the statute, it must be described and proved to be of that particular description, for the enumeration of the several kinds in the statute contradistinguishes the one from the other. Thus, an indictment for stealing a cow has been holden not to be supported by evidence of stealing a heifer, because the repealed statute, 15 *G.* 2. *c.* 34, upon which that indictment was framed, mentioned both cows and heifers. *R.* v. *Cook,* 1 *Leach,* 105; 2 *East, P. C.* 616. And where a defendant was indicted for stealing sheep, and they appeared by the evidence to be lambs, the judges held that the evidence did not support the indictment. *R.* v. *Loom,* 1 *Mood. C. C.* 160. *See R.* v. *Birket,* 4 *C. & P.* 216. For the same reason, an indictment for stealing a sheep was held not to be supported by proof of stealing an ewe. *R.* v. *Puddifoot,* 1 *Mood. C. C.* 247. *But see now Reg.* v. *M'Culley,* 2 *Mood. C. C.* 34, and *Reg.* v. *Spicer,* 1 *C. & K.* 699, *contrà;* for *sheep* is a generic name : *ante, p.* 51. An indictment for stealing a colt or filly would be supported by evidence of the larceny of a foal, because colt or filly means a young horse or mare; and a foal is not specifically mentioned in the statute. So it has been holden, that evidence of stealing a filly would support an indictment upon the repealed stat. 2 & 3 *Ed.* 6, for stealing a mare, because that statute mentioned merely horses, geldings, mares. *R.* v. *Welland, R. & R.*

494. A rig sheep or wether may properly be described as a sheep. *R.* v. *Stroud*, 6 *C. & P.* 535.

It should be observed, that this statute applies only to the stealing of live cattle, and that, if dead animals be stolen, it is but a common larceny, and the punishment is different. *As to the description of dead animals, see ante, p.* 171.

*Indictment for killing Horses, &c., with intent, &c.*

*Commencement as ante, p.* 169]—one sheep, ("*horse, mare, gelding, colt, or filly, bull, cow, ox, heifer, or calf, ram, ewe, sheep or lamb*"), of the price of twenty shillings, of the goods and chattels of J. N., then and there being found, then and there feloniously and wilfully did kill, with a felonious intent then and there to steal, take, and carry away part of the carcase, ("*the carcase or skin, or any part of the cattle so killed*"), that is to say, [the inward fat] of the said sheep; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The animal killed must be described by one of the names mentioned in the statute. R.* v. *Beaney, R. & R.* 416. (*See ante, p.* 196).

*Felony*, 7 & 8 *G.* 4, *c.* 29, *s.* 25, (*ante, p.* 195), *transportation for not more than fifteen nor less than ten years, or imprisonment not exceeding three years*, 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 1, (*ante, p.* 195), *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 195).

*Evidence.*

To support this indictment, you must prove two things:—

1. That the defendant killed the sheep: and this is proved either positively, as by a witness who saw him do it; or by circumstantial evidence, as, for instance, that the skins were found in his possession, or were sold by him to another person, or the like. (*See ante, p.* 122). Where the defendant was indicted for killing a lamb with intent to steal part of the carcase, and the evidence was, that he cut off the leg of the lamb whilst it was alive, and carried the leg away before the animal died; the lamb afterwards died of the wound; the judge at the trial thought that, as the death wound was given before the theft, it was sufficient, and the defendant was convicted; the judges afterwards were unanimous that the conviction was right. *R.* v. *Clay, R. & R.* 387: *see also Reg.* v. *Sutton*, 2 *Mood. C. C.* 29; 8 *C. & P.* 291.

2. That he killed the sheep with the intent stated in the indictment. The best proof of this is, that the part of the carcase mentioned was actually stolen. But if the defendant were caught in the fact, that is, after killing the sheep, but before he had actually cut it up, then it is for the jury to say, upon a consideration of the facts of the case, whether he did not intend to steal the carcase. Upon an indictment for killing three sheep, with intent to steal the whole of the carcases, the jury found that the defendant intended to steal a part of the carcases only; but the judges were of opinion that the evidence was sufficient to sustain the indictment, as the statute meant to make it immaterial whether the intent was to steal the

whole or a part only of the carcase. *R.* v. *Williams*, 1 *Mood. C. C.* 107.

In this, as in the last case, the evidence must correspond with the description of the animal in the indictment. (*See ante, p.* 196).

STEALING DOGS.

*Statute.*

8 & 9 *Vict. c.* 47, *s.* 1.]—*Recites and repeals* 7 & 8 *G.* 6, *c.* 29, *s.* 31, *so far as relates to dog stealing, and to dealing with the offenders in respect of the said offence.*

Sect. 2]—Enacts, that, if any person shall steal any dog, every such offender shall be guilty of a misdemeanor, and, being convicted thereof before any two or more justices of the peace, shall, for the first offence, at the discretion of the said justices, either be committed to the common gaol or house of correction, there to be imprisoned only, or be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding 10*l.*, as to the said justices shall seem meet; and if any person so convicted shall afterwards be guilty of the said offence, every such offender shall be guilty of an indictable misdemeanor, and being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, with or without hard labour, or by both, as the court in its discretion shall award, provided such imprisonment do not exceed eighteen months.

Sect. 3—*Knowingly being in possession of stolen Dogs, or the Skin thereof*]—Enacts, that, if any dog, or the skin thereof, shall be found in the possession or on the premises of any person, by virtue of any search warrant, to be granted as is hereafter in that behalf provided, the justice by whom such search warrant was granted may restore the same to the owner thereof, and the person in whose possession, or on whose premises the same shall be so found, (such person knowing that the dog has been stolen, or that the skin is the skin of a stolen dog), shall, on conviction before any two or more justices of the peace, be liable, for the first offence, to pay such sum of money, not exceeding 20*l.*, as to the justices shall seem meet; and if any person so convicted shall be afterwards guilty of the said offence, every such offender shall be deemed guilty of a misdemeanor, and punishable accordingly.

Sect. 4—*Advertising for the Return of stolen Dogs*]—Enacts, that if any person shall publicly advertise or offer a reward for the return or recovery of any dog which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any dog which shall have been stolen or lost, without seizing or making

any inquiry after the person producing such dog, every such person shall forfeit the sum of 25*l.* for every such offence, to any person who will sue for the same, by action of debt, to be recovered with full costs of suit.

Sect. 5—*Apprehension of Offenders*]—Enacts, that any person found committing any offence punishable either upon summary conviction or upon indictment by virtue of this act, may be immediately apprehended, without a warrant, by any police officer, or by the owner of the dog with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath, before a justice of the peace, a reasonable cause to suspect that any person has in his possession or on his premises any stolen dog, such justice may grant a warrant to search for such dog; and any person to whom any dog shall be offered to be sold or delivered, if he shall have reasonable cause to suspect that such dog has been stolen, is hereby authorized, and, if in his power, is required to apprehend, and forthwith to convey before a justice of the peace, the party offering the same, together with such dog, to be dealt with according to law.

Sect. 6—*Taking Reward under Pretence of recovering stolen Dogs*]—Enacts, that any person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and punishable accordingly.

### *Indictment for stealing a Dog, after a previous Conviction.*

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the —— day of ——, in the seventh year of the reign of our sovereign lady Victoria, at —— in the county aforesaid, was duly convicted before J. P., Esq., and the Rev. O. R., clerk, two of her Majesty's justices of the peace for the said county, for that he the said J. S., on [*&c. as in the first conviction, to the words*] against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged, for his said offence, to be committed to and imprisoned in the house of correction in and for the said county, for the term of three calendar months. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and after he had been so convicted as aforesaid, to wit, on the 3rd day of August, in the year last aforesaid, at the parish first aforesaid, in the county aforesaid, one dog, of the value of two pounds, the property of J. N., then and there unlawfully did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor; fine or imprisonment, with or without hard labour, not exceeding eighteen calendar months, or both.* 8 *&* 9 *Vict. c.* 47, *s.* 2.

*Evidence.*

Prove the former conviction, (*see ante, p.* 125), the identity of the defendant, the larceny of the dog, as directed *ante, p.* 170 *et seq.*, and that it is the property of J. N. The value is immaterial.

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STEALING, REMOVING, OBLITERATING, &c. RECORDS, &c.

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*Statute.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 21]—Enacts, that, if any person shall steal, or shall, for any fraudulent purpose, take from its place of deposit for the time being, or from any person having lawful custody thereof, or shall unlawfully or maliciously obliterate, injure, or destroy, any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value.

*Indictment for stealing a Record, &c.*

*Commencement as ante, p.* 169]—a certain judgment-roll of the court of our lady the Queen, before the Queen herself, ("*any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of or belonging to any court of equity, o relating to any cause or matter begun, depending, or terminated in any such court*"), then and there being found, then and there unlawfully did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It is not necessary to allege that the record, &c. is the property of any person, or is of any value.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 21.

*Misdemeanor, transportation for seven years; or imprisonment (with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169), *such confinement not exceeding one month at any one time, nor*

*three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169); *or fine, or both.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 21. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove a larceny of the record, &c., described in the indictment, as directed *ante, p.* 172 *et seq.* It is an indictable offence at common law to steal the parchment upon which a record, not concerning the realty, is written. *R.* v. *Walker,* 1 *Mood. C. C.* 155.

### *Indictment for taking a Record, &c., from its Place of Deposit.*

*Commencement as ante, p.* 169]—a certain judgment-roll of the court of our said lady the Queen before the Queen herself, (*see the last precedent*), from its place of deposit for the time being, to wit, from the treasury of the said court, [*or,* from one J. N., the said J. N. then and there having the lawful custody of the same], unlawfully and for a fraudulent purpose, did take; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If possible, add a second count specifying the fraudulent purpose.* (*See post, p.* 202.)

*Misdemeanor, see the last precedent.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 21.

### *Evidence.*

Prove that the record, &c., described in the indictment was deposited in the treasury of the court of Queen's Bench, or other place mentioned in the indictment, and that such was its proper place of deposit; or, that the person from whose custody the record, &c., is charged in the indictment, to have been taken, was by law entitled to have, and in fact had, possession of it at the time. That the defendant took the record, &c., from the place or person mentioned in the indictment, which may be proved either by positive or circumstantial evidence. (*See ante, p.* 122). And that he took it for a fraudulent purpose, which, in most cases, can only be matter of inference from circumstances, and is not capable of direct proof. The mere taking is evidence from which fraud may fairly be presumed, unless it be satisfactorily explained by the defendant.

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### *Indictment for obliterating, injuring, or destroying a Record, &c.*

*Commencement as ante, p.* 169]—a certain judgment-roll of the court of our said lady the Queen before the Queen herself, (*see supra*), then and there being found, then and there unlawfully and maliciously did obliterate, ("*obliterate, injure, or destroy*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, see the last precedent but one.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 21.

### *Evidence.*

Prove the obliteration, injury, or destruction, of the record, &c., by the defendant, as stated in the indictment. Prove that it was

done maliciously, which may be inferred, if it be proved to have been done wilfully.

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STEALING, DESTROYING, OR CONCEALING A WILL, &c.

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*Statute.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 22]—Enacts, that, if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor; and being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned, (*s.* 21, *ante*, *p.* 200); and it shall not in any indictment for such offence be necessary to allege, that such will, codicil, or other instrument, is the property of any person, or that the same is of any value.

Sect. 24—*Not to deprive Party grieved of Remedy, and not to apply in certain Cases*]—Provides and enacts, that nothing in this act contained, relating to either of the misdemeanors aforesaid, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity, which any party, aggrieved by any such offence, might or would have had if this act had not been passed; but nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanors aforesaid, by any evidence whatever, in respect of any act done by him, if he shall at any time, previously to his being indicted for such offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved; or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

*Indictment.*

*Commencement as ante, p.* 169.]—A certain will and testamentary instrument ("*any will, codicil, or other testamentary instrument*") of one J. N., then and there being found, unlawfully did steal, take, and carry away, [*or*, unlawfully, and for a fraudulent purpose, did destroy and conceal]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Where the indictment is for destroying or concealing a will, &c., and another count specifying the fraudulent purpose, if it can be done with certainty. In Reg.* v. *Morris,* 9 *C. & P.* 89, *Alderson,* B., *intimated an opinion that such statement was necessary to the validity of the indictment. It is not necessary to allege*

*that the will, &c., is the property of any person, or is of any value.* 7 & 8 *G.* 4, *c.* 29, *s.* 22.

*Misdemeanor, transportation for seven years; or imprisonment,* (*with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 & 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p,* 169); *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169), *or fine, or both.* 7 & 8 *G.* 4, *c.* 29, *s.* 22. *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove a larceny of the will, &c., as directed *ante, p.* 172 *et seq.*; or if the indictment be for destroying or concealing a will, &c., prove the destruction or concealment by the defendant, as stated in the indictment; and also the fraudulent purpose for which he did it. The fraudulent purpose can, in most cases, be only matter of inference, not capable of direct proof; (*see Reg.* v. *Morris,* 9 *C.* & *P.* 89); but the mere destruction or concealment, unexplained by the defendant, is evidence from which fraud may fairly be presumed. It is immaterial whether the will, &c., be stolen during the life or after the death of the testator, or whether it relate to real or personal estate, or to both. 7 & 8 *G.* 4, *c.* 29, *s.* 22.

No person can be convicted of this offence by any evidence whatever, in respect of any act done by him, if, at any time previously to his being indicted for the offence, he shall "have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved; or if he shall have disclosed the same in any examination or deposition before commissioners of bankrupt." 7 & 8 *G.* 4, *c.* 29, *s.* 24.

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STEALING WRITINGS, &c., RELATING TO REAL ESTATE.

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*Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 23]—Enacts, that if any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title, or of any part of the title, to any real estate, every such offender shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned, (*s.* 21, *ante, p.* 200); and in any indictment for such offence, it shall be sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the person, or of some one of the persons having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof; and it shall not be necessary to allege the thing stolen to be of any value.

Sect. 24.—(*Ante, p.* 202).

*Indictment.*

*Commencement as ante, p.* 169]—a certain written parchment (" *any paper or parchment, written or printed, or partly written and partly printed*") the property of J. N., being evidence of the title [*or*, of part of the title] of the said J. N. to a certain real estate [*or*, to part of a certain real estate] called *Whiteacre*, in which said real estate the said J. N. then and there had, and still hath, a present interest, then and there being found, then and there unlawfully did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a second count, describing the nature of the instrument more particularly thus:*—a certain other written parchment, containing a deed of release between A. B., of the one part, and C. D., of the other part, the property of J. N., being evidence, &c. *It is sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the person, or of some one of the persons, having a present interest, whether legal or equitable, in the real estate to which the same relates; and to mention such real estate, or some part thereof; and it is not necessary to allege the thing stolen to be of any value.*

*Misdemeanor, transportation for seven years; or imprisonment,(with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *or fine, or both.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 23. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove a larceny of the written parchment, as directed *ante, p.* 170 *et seq.;* for, although this is not a felony, the jury must be satisfied that the defendant took the parchment under such circumstances as would have amounted to larceny if the parchment in question had been the subject of larceny. *R.* v. *John*, 7 *C. & P.* 324. Prove, also, that it is evidence of the title or part of the title of J. N. to the real estate mentioned in the indictment, or part of it, which may be done by producing the instrument, or giving secondary evidence of it, (*see ante, p.* 112), and by shewing how J. N. claims the estate. Prove also, that, at the time of the larceny, J. N. had a present interest, legal or equitable, in the real estate, of his title to which the written parchment is evidence. The words of the statute are "present interest," which were probably used in contradistinction to a contingent interest, which may never be realised, and were intended to mean a possession or perception of rents or profits by the prosecutor or his trustee, or the immediate right thereto.

No person can be convicted of this offence by any evidence whatever in respect of any act done by him, if at any time previously to his being indicted for the offence he shall "have disclosed such act on oath in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved; or if he shall have

disclosed the same in any examination or deposition before commissioners of bankrupt." *7 & 8 G. 4, c. 29, s. 24*, (*ante, p.* 202).

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STEALING, OR SEVERING WITH INTENT TO STEAL, ORE, &c., FROM A MINE.

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*Statute.*

7 & 8 *G.* 4, *c.* 20, *s.* 37]—Enacts, that if any person shall steal or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof, respectively, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. (*Ante, p.* 168).

*Indictment.*

*Commencement as ante, p.* 169]—twenty pounds weight of copper ore, ("*the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal*"), of the value of twenty shillings, the property of J. N., in a certain mine of copper ore ("*mine, bed, or vein thereof respectively*") of the said J. N., there situate, then and there being found, from the said mine then and there feloniously did steal, take, and carry away [*or*, feloniously did sever, with intent the same then and there feloniously to steal, take, and carry away]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *An indictment alleging that the defendants, being persons employed in a mine, in the parish of &c., in the county of Cornwall, on &c., at &c., did steal certain ore, the property of the adventurers in the said mine, then and there being found, does not sufficiently shew that the ore was stolen from the mine, within this statute. Reg.* v. *Trevenner*, 2 *M. & Rob.* 476.

*Felony, transportation for seven years, or imprisonment not exceeding two years,* (*with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement*, 7 & 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169), *such confinement not exceeding one month at any one time, nor three months in any one year*, 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *and, if a male, to be once, twice, or thrice, publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 & 8 *G.* 4, *c.* 29, *s.* 37.

*Evidence.*

Prove a larceny of the ore, &c., as directed *ante, p.* 170 *et seq.*, or, if a severance with intent to steal be alleged in the indictment, prove the severance and circumstances from which the jury may imply the intent. (*See ante, p.* 102). Prove, also, that the mine was at the time in the possession or occupancy of J. N., and is situate as described in the indictment.

It is not larceny for miners employed to bring ore to the surface,

and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owner. *R.* v. *Webb*, 1 *Mood. C. C.* 431.

STEALING OR CUTTING TREES, &c.

*Statute.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 38]—Enacts, that, if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively, growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny ; (*ante, p.* 168) ; and if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively, growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. (*Ante, p.* 168).

*Indictment for stealing or cutting, &c., with intent to steal, Trees, &c., in Parks, &c., value above 1l.*

*Commencement as ante, p.* 169]—one oak tree ("*the whole or any part of any tree, sapling, or shrub, or any underwood*"), of the value of two pounds*, the property of J. N., then and there growing in a certain park ("*park, pleasure-ground, garden, orchard, avenue, or any ground adjoining or belonging to any dwelling-house*"), of the said J. N., there situate in the said park, then and there feloniously did steal, take, and carry away, [*or*, feloniously did cut, ("*cut, break, root up, or otherwise destroy or damage*"), with intent the same then and there feloniously to steal, take, and carry away, thereby then and there doing injury to the said J. N., to an amount exceeding the sum of one pound, to wit, to the amount of two pounds] ; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

* *If the indictment be for cutting, &c., with intent to steal, omit this allegation of value.*

*Felony, transportation for seven years, or imprisonment not exceeding two years, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169), *such confinement not exceeding one month at any*

*one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, *ante, p.* 169), *and, if a male, to be once, twice, or thrice, publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 38.

*Evidence.*

Prove a larceny of the tree, as directed *ante, p.*170 *et seq.;* or, if the indictment allege that the defendant cut &c. the tree with intent to steal it, prove the cutting, &c., as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante, p.* 102). In the former case, the value of the tree, and in the latter, the amount of the injury done, must be proved to exceed the sum of 1*l.* But, if several trees be stolen or cut at the same time, and the value or injury done exceed that amount in the aggregate, it will be sufficient. Prove that the tree, &c., stolen or cut, &c., was at the time growing in a park, &c., belonging to or in the occupation of J. N., and situate as described in the indictment. The words "adjoining any dwelling-house" import actual contact; and, therefore, ground separated from a house by a narrow walk and paling, wall, or gate, is not within their meaning. *R.* v. *Hodges, Moo. & M.* 341.

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*Indictment for stealing or cutting, &c., with intent to steal Trees, &c., growing elsewhere, value above 5l.*

*Commencement as ante, p.* 169]—one ash tree ("*the whole or any part of any tree, sapling, or shrub, or any underwood*"), of the value of six pounds*, the property of J. N., then and there growing in a certain close ("*elsewhere, than in a park, pleasure-ground, garden, orchard, avenue, or any ground adjoining or belonging to any dwelling-house*"), of the said J. N., there situate, in the said close then and there feloniously did steal, take, and carry away [*or,* feloniously did cut ("*cut, break, root up, or otherwise damage or destroy*"), with intent the same then and there feloniously to steal, take, and carry away; thereby then and there doing injury to the said J. N. to an amount exceeding the sum of five pounds, to wit, to the amount of six pounds]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

* *If the indictment be for cutting, &c., with intent to steal, &c., omit this allegation of value.*

*Felony, see the last precedent.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 38, (*ante, p.* 206).

*Evidence.*

Prove a larceny of the tree, as directed *ante, p.* 170 *et seq.;* or, if the indictment allege that the defendant cut, &c. the tree with intent to steal it, prove the cutting, as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante, p.* 102). In the former case, the value of the tree, and, in the latter, the amount of injury done, must be proved to exceed the value of 5*l.*; but if several trees be stolen or cut at the same time, and the value or injury done in the aggregate exceed that amount, it will be

sufficient. Prove that the close in which the tree was stolen or cut belonged to, or was in the occupation of, J. N., and was situate as described in the indictment. It is not necessary to prove that the close was not a park, &c.

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## STEALING OR CUTTING TREES, AFTER TWO PREVIOUS CONVICTIONS.

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### *Statute.*

*7 & 8 G. 4, c.* 29, *s.* 39]—Enacts, that if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, every such offender, being convicted before a justice of the peace, shall, for the first offence, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. (*Ante, p.* 168).

Sect. 74]—Enacts, that every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against, until the contrary be shewn.

### *Indictment.*

Middlesex, to wit: The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the —— day of ——, in the seventh year of the reign of our sovereign lady Victoria, at ——, in the county of ——, was duly

convicted before J. P., one of her said Majesty's justices of the peace for the said county of ——, for that he the said J. S., on [*&c., as in the first conviction to the words*]—against the form of the statute in such case made and provided; and the said J. S. was thereupon then and tnere adjudged, for his said offence, to forfeit and pay the sum of five pounds over and above the value of the said tree so stolen as aforesaid, and the further sum of two shillings, being the value of the said tree, and also fo pay the further sum of —— shillings for costs; and, in default of immediate payment of he said sums, to be imprisoned in the ——, ard there kept to hard labour for the space of —— calendar months, unless the said sums should be sooner paid. And the jurors aforesaid, udon their oaths aforeaid, do further pre sent, that the said J. S. afterwards, on the —— day of ——, in the eighth year of the reign of our sovereign lady Victoria, at ——, in the county of ——, was duly convicted before L. S., one of her Majesty's justices of the peace for the said county of ——, for that he [*&c., setting out the second conviction in the same manner as the first, and proceed thus:*] And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish of B., in the county of M., labourer, afterwards, and after he had been so twice convicted as aforesaid, on the third day of August, in the year last aforesaid, at the parish of B., in the county of M., one oak sapling, ("*the whole or any part of any tree, sapling, or shrub, or any underwood*"), of the value of two shillings*, the property of J. N., then and there growing, ("*wheresoever growing*"), then and there feloniously did steal, take, and carry away, [*or*, feloniously did cut, ("*cut, break, root up, or otherwise destroy or damage*"), with intent the same then and there feloniously to steal, take, and carry away; thereby then and there doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

* *If the indictment be for cutting, &c., with intent to steal, omit this allegation of value.*

*Felony, punishable as simple larceny.* 7 & 8 *G.* 4, *c.* 29, *s.* 39. (*See ante, p.* 168).

*Evidence.*

Prove the two former convictions, (*see ante, p.* 125, *and stat.* 7 & 8 *G.* 4, *c.* 29, *s.* 74, *ante, p.* 208),—the identity of the defendant—the larceny of the sapling, as directed *ante, p.* 170 *et seq.;* or, if the defendant be charged with cutting, &c., the sapling with intent to steal it, the cutting, as stated in the indictment, and circumstances from which the jury may imply the intent. (*See ante, p.* 102). Prove also that the sapling was growing on land belonging to or in the occupation of J. N., and that, in the first case, the value, and, in the second, the amount of the injury done, exceeds one shilling.

## STEALING OR DESTROYING PLANTS, &c., IN GARDENS, &c.

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### *Statute.*

7 *&* 8 *G.* 4, *c.* 29, *c.* 42]—Enacts, that if any person shall steal, or shall destroy or damage, with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. (*Ante*, *p.* 168).

Sect. 74.]—(*Ante*, *p.* 208).

### *Indictment.*

*Commencement as ante, p.* 208, (*setting out the conviction to the words*)]—against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged for his said offence to forfeit and pay the sum of twenty pounds, over and above the amount of the injury so done as aforesaid, and the further sum of six shillings, being the amount of the said injury; and also to pay the sum of —— shillings for costs; and, in default of immediate payment of the said sums, to be imprisoned in the ——, and there kept to hard labour for the space of —— calendar months, unless the said sums should be sooner paid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish of B., in the county of M., labourer, afterwards, and after he was so convicted as aforesaid, on the third day of August, in the year aforesaid, at the parish of B., in the county of M., twenty pounds weight of grapes, ("*plant, root, fruit, or vegetable production*") of the value of five shillings, the property of J. N., in a certain garden ("*garden, orchard, nursery-ground, hot-house, green-house, or conservatory*") of the said J. N., there situate, then and there growing, then and there feloniously did steal, take, and carry away, [*or*, feloniously did damage ("*destroy or damage*"), with intent the same then and there feloniously to steal, take, and carry away]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, punishable as simple larceny,* (*see ante, p.* 168); 7 *&* 8 *G.* 4, *c.* 29, *s.* 42.

*Evidence.*

Prove the former conviction, (*see ante, p.* 125); a larceny of the grapes, as directed *ante, p.* 170 *et seq.;* or, if the indictment allege that the defendant damaged the grapes with intent to steal them, the damage as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante, p.* 102). Prove, also, that, at the time of the offence, the grapes were growing in a garden belonging to or in the occupation of J. N., and situate as described in the indictment. The words "plant," or "vegetable production," do not include young trees. *R.* v. *Hodges, Moo. & M.* 341. Whether ground be properly described as a garden, is a question for the jury. *Ib.*

STEALING OR CUTTING, WITH INTENT, &C., LEAD, METAL, OR FIXTURES.

*Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 44]—Enacts, that if any person shall steal, or rip, cut or break, with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building, whatsoever, or anything made of metal, fixed in any land, being private property, or for a fence to any dwelling-house, garden, area, or in any square, street, or other place dedicated to the public use or ornament, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; (*ante, p.* 168); and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person.

*Indictment for stealing, or cutting with intent, &c., Lead, &c., affixed to Buildings, &c.*

*Commencement as ante, p.* 169]—sixty pounds weight of lead, ("*any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil, or fixture, whether made of metal or other material*"), of the value of six shillings, the property of J. N., then and there being fixed to the dwelling-house ("*any building whatsoever*"), of the said J. N., there situate, then and there feloniously did steal, take, and carry away [*or*, feloniously did rip, cut, and break, ("*rip, cut, or break*"), with intent the same then and there feloniously to steal, take, and carry away]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*The venue can only be laid in the county in which the offence was committed.* *R.* v. *Millar*, 7 *C.* & *P.* 665.

*Felony punishable as simple larceny.* 7 & 8 *G.* 4, *c.* 29, *s.* 44. (*See ante, p.* 168).

*Evidence.*

Prove a larceny of the lead, &c., as directed *ante, p.* 170 *et seq.*; or if the indictment charged that the defendant ripped, &c. the lead, with intent to steal it, prove the ripping, &c., as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante, p.* 102). Prove, also, that the house from which the lead was stolen or ripped was the dwelling-house of J. N., situate as described in the indictment. An unfinished building intended as a cart shed, which is boarded up on all its sides, and has a door with a lock on it, and the frame of a roof with loose gorse thrown upon it, because it is not yet thatched, is a building within the meaning of this statute. *R.* v. *Worrall*, 7 *C.* & *P.* 516. Any material variance in the description of the building, between the indictment and evidence, will be fatal.

An indictment for stealing a copper pipe fixed to the dwelling-house of A. and B., is not supported by proof of stealing a pipe fixed to two rooms of which A. and B. are *separate* tenants in the same house. *R.* v. *Finch*, 1 *Mood. C. C.* 418. Where a man (having given a false representation of himself) got into possession of a house under a treaty for a lease of it, and then stripped it of the lead, the jury, being of opinion that he obtained possession of the house with intent to steal the lead, found him guilty; and he afterwards had judgment. *R.* v. *Munday*, 2 *Leach*, 850; 2 *East, P. C.* 594.

Upon an indictment on this section of the statute, the defendant cannot be convicted of a simple larceny. *Reg.* v. *Gooch*, 8 *C.* & *P.* 293.

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*Indictment for stealing, or ripping, &c., with intent, &c., Metal fixed in Land, being private Property, or for a Fence to a Dwelling-house, &c.*

*Commencement as ante, p.* 169]—two hundred pounds weight of iron, ("*anything made of metal*"), of the value of ten shillings, the property of J. N., then and there being fixed in certain land which was then private property, to wit, in a garden ("*in any land being private praperty*") of the said J. N. there situate, [*or*, fixed for a fence to a dwelling-house, ("*dwelling-house, garden, or area*"), of the said J. N. there situate], then and there feloniously did steal, take, and carry away, [*or*, feloniously did rip, cut, and break, ("*rip, cut, or break*"), with intent the same then and there feloniously to steal, take, and carry away]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, punishable as simple larceny.* 7 & 8 *G.* 4, *c.* 29, *s.* 44. (*See ante, p.* 168).

*Evidence.*

Prove a larceny of the iron, as directed *ante, p.* 170 *et seq.*; or, if the indictment charge that the defendant ripped, &c., the iron with

intent to steal it, prove the ripping, &c., and circumstances from which the jury may infer the intent. (*See ante, p.* 102). Prove, also, that the iron was fixed in a garden in the possession or occupation of J. N., that the garden was private property, and is situate as described in the indictment; or, if the indictment be for stealing, or ripping, &c., with intent to steal, iron fixed for a fence to a dwelling-house, &c., prove that the iron was fixed as stated in the indictment, that the dwelling-house was at the time in the possession or occupation of J. N.; and is situate as described in the indictment. The defendant cannot be convicted of simple larceny. *Reg.* v. *Gooch*, (*ante, p.* 212).

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*Indictment for stealing, or ripping, &c., with intent to steal, Metal fixed in a Square, &c.*

*Commencement as ante, p.* 169]—ten iron rails, of the value of five shillings, and twenty-five pounds weight of iron, of the value of five shillings, ("*anything made of metal*"), then and there being fixed in a certain square called Grosvenor Square, ("*in any square, street, or other place dedicated to public use or ornament*"), then and there feloniously did steal, take, and carry away, [*or*, feloniously did rip, cut, and break, ("*rip, cut, or break*"), with intent the same then and there feloniously to steal, take, and carry away], against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It is not necessary in the indictment to allege the thing stolen, &c., to be the property of any person.* 7 & 8 *G.* 4, *c.* 29, *s.* 44.

*Felony, punishable as simple larceny.* 7 & 8 *G.* 4, *c.* 29, *s.* 44. (*See ante, p.* 168).

*Evidence.*

Prove a larceny of the rails, as directed *ante, p.* 170 *et seq.*; or if the indictment charge the defendant with ripping, &c. the rails with intent to steal them, prove the ripping, &c., and circumstances from which the jury may infer the intent. (*See ante, p.* 102). Prove, also, that the rails were fixed in the square, as mentioned in the indictment, and that the square is situate as is there described. In *R.* v. *Blick*, 4 *C.* & *P.* 377, *Bosanquet*, J., was of opinion, that a churchyard was a place dedicated to public use within the meaning of this act; and, accordingly, that it was felony to rip or steal brass affixed to a tombstone. It is not necessary to prove that the rails were the property of any person. The defendant cannot be convicted of simple larceny. *Reg.* v. *Gooch, ante, p.* 212.

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STEALING BILLS OF EXCHANGE AND OTHER VALUABLE SECURITIES.

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*Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 5]—Enacts, that if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing

the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony of the same nature, and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby, and remaining unsatisfied, or with the value of the goods, or other valuable thing mentioned in the warrant or order; and each of the several documents hereinbefore enumerated, shall, throughout this act, be deemed for every purpose to be included under and denoted by the words "valuable security."

### *Indictment.*

*Commencement as ante, p.* 169]—one bill of exchange ("*any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank,*" or "*any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money, or for payment of money, whether of this kingdom or of any foreign state;*" or "*any warrant or order for the delivery or transfer of any goods or valuable thing*") for the payment of ten pounds, and of the value of ten pounds, the property of J. N., then and there being found, the said sum of ten pounds, secured and payable by and upon the said bill of exchange, being then and there due and unsatisfied to the said J. N., feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the description of the bill or other security, see ante, p.* 46. *An indictment for stealing a bank note did not conclude contra formam statuti, and upon that ground was held by the judges to be bad. R.* v. *Pearson,* 1 *Mood. C. C.* 313; 5 *C. & P.* 121. *If the instrument be for any reason void in law, the defendant may be convicted on a count charging him with stealing a piece of paper. Reg.* v. *Perry,* 1 *C. & K.* 725.

*Felony, of the same nature, and in the same degree, and punishable in the same manner, as if the defendant had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby, and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in the warrant or order.* 7 & 8 *G.* 4, *c.* 29, *s.* 5.

### *Evidence.*

Prove a larceny of the bill, &c. as directed *ante, p.* 170 *et seq.* The defendant, a stock broker, received from the prosecutor a cheque

upon his banker, to purchase Exchequer bills for him; the defendant cashed the cheque, and absconded with the money. Upon an indictment for stealing the cheque and the proceeds of it, it was holden to be no larceny, although the jury found that, before he received the cheque, the defendant had formed the intention of converting the money to his own use: not of the cheque because the defendant had used no fraud or contrivance to induce the prosecutor to give it to him; and because, being the prosecutor's own cheque, and of no value in his hands, it could not be called his goods and chattels; nor of the proceeds of the cheque, because the prosecutor never had possession of them, except by the hands of the defendant. *R.* v. *Walsh*, *R. & R.* 215. But where the prosecutors gave to the defendant, who was occasionally employed as their clerk, a cheque payable to a creditor, to be delivered by him to the creditor, and he appropriated it to his own use, it was holden by the judges to be a larceny of the cheque. *R.* v. *Metcalfe*, 1 *Mood. C. C.* 433: *Reg.* v. *Heath*, 2 *Mood. C. C.* 33.

The bill or other security must be of the description specified in the statute. Thus, an indictment (upon the repealed statute, 2 *G.* 2, *c.* 25, *s.* 3, which applied to bank notes, bills of exchange, &c., bills, or promissory notes, &c.) for stealing a certain note, *commonly called* a bank note, was holden insufficient. *R.* v. *Craven*, *R. & R.* 14. And the same where the indictment described the instrument stolen as a "bank post bill," for the statute did not comprehend instruments of that description. *R.* v. *Chard*, *Id.* 488. So, where the defendant was indicted for stealing certain bills, commonly called Exchequer bills, and it appeared in evidence that the person who signed them on the part of the government was not legally authorised to do so, it was holden that they were not good Exchequer bills, and the defendant was acquitted. *R.* v. *Astlett*, 2 *Leach*, 954. In *R.* v. *Phipoe*, 2 *Leach*, 673, where the prosecutor was compelled by duress to sign a promissory note, which had been previously prepared by the defendant, who produced it, and withdrew it again as soon as it was signed, a great difference of opinion existed among the judges; but the majority thought that it was not a case within the statute, 2 *G.* 2, *c.* 25, *s.* 3, because the instrument was of no value to the prosecutor, who had not even a property in the paper upon which it was written. *And see R.* v. *Edwards*, 6 *C. & P.* 515, 521. And where, in consequence of an advertisement, A. applied to B. to raise money for him, who promised to procure 5000*l.*, and produced ten blank 6*s.* stamps, across which A. wrote an acceptance, and B. took them up without saying anything, and afterwards filled up the stamps as bills for 500*l.* each, and put them into circulation, it was holden by *Littledale*, J., *Bolland*, B., and *Bosanquet*, J., that the stamps so filled up were not bills of exchange, orders for the payment of money, or securities for money, within the meaning of the statute. *R.* v. *Minter Hart*, 6 *C. & P.* 106. Where country bank notes, paid by the agent in London, were sent by him to the bankers in the country to be re-issued, and were stolen by the defendant, who was indicted for stealing the notes, and also for stealing the paper and stamps; this was held to be a larceny of the paper and stamps, but the judges seem to have been of opinion that the notes were not within the stat. 2 *G.* 2, *c.* 25, *s.* 3, because it could not be said that the money secured

thereby was due and unsatisfied. *R.* v. *Clark*, *R.* & *R.* 181; 2 *Leach*, 1036. *See Reg.* v. *Perry*, 1 *C.* & *K.* 725, *ante*, *p.* 214. So, where the defendant was indicted for receiving certain pieces of stamped paper, the goods and chattels of the prosecutor, and it appeared that the notes had been paid in London, and were in the possession of a partner of the firm, who was taking them to the country to be re-issued, when they were stolen, it was holden that they were properly described in the indictment as goods and chattels; but some of the judges doubted whether they were valuable securities within the meaning of the stat. 7 & 8 *G.* 4, *c.* 29, *s.* 5. *R.* v. *Vyse*, 1 *Mood. C. C.* 218. The halves of notes, if stolen, should be described as goods and chattels. *R.* v. *Mead*, 4 *C.* & *P.* 535. Where, upon an indictment on the repealed stat. 7 *G.* 3, *c.* 50, *s.* 1, which made it felony for persons employed in the post-office to secrete any letter, &c., containing any note, &c., it appeared that the note had been paid to the holder, and had not been re-issued; the judges were of opinion that such notes retained the character, and fell within the description of promissory notes, and were, as promissory notes, valuable to the owners of them. *R.* v. *Ranson*, *R.* & *R.* 232; 2 *Leach*, 1090, 1093. A cheque on a banker, written on unstamped paper, payable to D. F. J., and not made payable to bearer, is not a valuable security within the meaning of the statute. *R.* v. *Yates*, 1 *Mood. C. C.* 170. A cheque on a banker may be described as "a valuable security, to wit, a cheque, of the value of" &c. without stating the drawee to be a banker. *Reg.* v. *Heath*, 2 *Mood. C. C.* 33. It is not necessary that a bill should be indorsed by the payee at the time it is stolen, so as to be in a negotiable state. *Anon.*, 2 *East*, *P. C.* 598: *see R.* v. *Pooley*, *R.* & *R.* 12. The *money orders* issued by the post-office are warrants and orders for the payment of money within the statute, and it is no objection that they are unstamped, the practice of issuing them without a stamp having existed before, and been legalized by, the stat. 3 & 4 *Vict. c.* 96. *Reg.* v. *Gilchrist*, 2 *Mood. C. C.* 233; *C.* & *Mar.* 224.

The evidence must correspond with the description of the instrument in the indictment. Where an indictment for stealing a bank note alleged it to be signed by J. B., for the Governor and Company of the Bank of England, and no evidence was given of the signature of J. B., the judges held that the defendant should have been acquitted. *R.* v. *Craven*, *R.* & *R.* 14. But where the defendant was indicted in the county of Gloucester for stealing a bill of exchange, whereon were indorsed the names of A. B. and C. D., and when it was negotiated by the defendant in that county, the name of a third indorser was added, the judges held that the addition of the third name made no difference, the names of the two indorsers only being on the bill at the time it was stolen from the prosecutor at Manchester. *R.* v. *Austin*, 2 *East*, *P. C.* 602. By stat. 1 *G.* 4, *c.* 92, *s.* 3, the Bank of England may impress upon their notes by machinery the names of their signing clerks, and notes so impressed are to be deemed and taken to be and may be described in indictments as bank notes in the same manner as if they had been subscribed in the handwriting of the signing clerks.

STEALING, &c., LETTERS, &c.

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*Statutes.*

7 *Will.* 4 *&* 1 *Vict. c.* 36, *s.* 25—*Opening or delaying Letters*]—Enacts, that every person employed by or under the post-office, who shall contrary to his duty open, or procure or suffer to be opened, a post letter, or who shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet: provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening, or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand of one of the principal secretaries of state.

Sect 26—*Stealing or embezzling Letters*]—Enacts, that every person employed under the post-office, who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy a post letter, shall be guilty of felony, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life.

Sect. 27—*Stealing Money, &c., out of Letters*]—Enacts, that every person who shall steal from or out of a post letter, any chattel, money, or valuable security, shall be guilty of felony, and shall be transported beyond the seas for life.

Sect. 28—*Stealing Letters sent by the Mail*]—Enacts, that every person who shall steal a post letter bag, or a post letter from a post letter bag, or shall steal a post letter from a post-office or from any officer of the post-office, or from a mail, or shall stop a mail with intent to rob or search the same, shall be guilty of felony, and shall be transported beyond the seas for life.

Sect. 29—*Stealing, &c., Letters sent by a Post-office Packet*]—Enacts, that every person who shall steal, or unlawfully take away a post letter bag sent by a post-office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall be guilty of felony, and shall be transported beyond the seas for any term not exceeding fourteen years.

Sect. 31—*Fraudulently retaining Letters after Delivery, &c.*]—*Recites, that post letters are sometimes by mistake delivered to the wrong*

*person; and post letters and post letter bags are lost in the course of conveyance or delivery thereof, and are detained by the finder in expectation of gain or reward, and* enacts, that every person who shall fraudulently retain, or shall wilfully secrete, or keep, or detain, or, being required to deliver up by any officer of the post-office, shall neglect or refuse to deliver up, a post letter which ought to have been delivered to any other person, or a post letter bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or neglecting, or refusing to deliver up the same, or by any other person, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be punished by fine and imprisonment.

Sect. 32—*Stealing printed Votes, Newspapers, &c.*]—Enacts, that every person employed in the post-office who shall steal, or shall for any purpose embezzle, secrete, or destroy, or shall wilfully detain, or delay in course of conveyance or delivery thereof by the post, any printed votes or proceedings in Parliament, or any printed newspaper, or any other printed paper whatever sent by the post, without covers or in covers open at the sides, shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or both, as to the court shall seem meet.

Sect. 36—*Endeavouring to procure the Commission of such Offences*]—Enacts, that every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the Post-Office acts, shall be guilty of a misdemeanor; and, being thereof convicted, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

Sect. 37—*Venue*]—Enacts, that the offence of every offender against the Post-Office acts may be dealt with, and indicted and tried, and punished, and laid and charged to have been committed, either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place; and where an offence shall be committed in or upon, or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter bag or post letter, or in respect of a post letter bag, or post letter, or a chattel, or money, or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail, or the person, or the post letter bag, or the post letter, or the chattel, or the money, or the valuable security sent by the post, in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had been actually committed in such county or place; and in all cases where the side or the centre, or other part of a highway, or the side, the bank, the centre, or the part of a river, or canal or navigation, shall constitute the boundary of two counties, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, in either of the said

counties through which, or adjoining to which, or by the boundary of any part of which, the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place; and every accessary before or after the fact to any such offence, if the same be a felony or a high crime, and every person aiding or abetting, or counselling or procuring, the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried.

Sect. 40—*Property, how laid*]—Enacts, that in every case where an offence shall be committed in respect of a post letter bag or a post letter, or a chattel, money, or a valuable security, sent by the post, it shall be lawful to lay, in the indictment to be preferred against the offender, the property of the post letter bag or of the post letter, or chattel, or money, or the valuable security sent by the post, in the Postmaster-General; and it shall not be necessary in the indictment to allege or to prove upon the trial, or otherwise, that the post letter bag, or any such post letter or valuable security, was of any value; and in any indictment to be preferred against any person employed under the post-office for any offence committed against the Post-Office acts, it shall be lawful to state and allege that such offender was employed under the Post-Office of the United Kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment.

Sect. 41—*Punishment*]—Enacts, that every person convicted of any offence for which the punishment of transportation for life is herein awarded, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every person convicted of any offence punishable according to the Post-Office acts by transportation for fourteen years, shall be liable to be transported for any term not exceeding fourteen years nor less than seven, or to be imprisoned for any term not exceeding three years.

Sect 42—*Hard Labour and solitary Confinement*]—Enacts, that where any person shall be convicted of an offence punishable under the Post-Office acts, for which imprisonment may be awarded, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and may also direct that he shall be kept in solitary confinement for the whole or any portion of such imprisonment, as to the court shall seem meet. *But see* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5; (*ante, p.* 169).

Sect. 47—*Interpretation Clause*]—Enacts, that the following terms and expressions (*amongst others*) shall have the several interpretations hereinafter respectively set forth, unless such interpretations are repugnant to the subject, or inconsistent with the context of the provisions in which they may be found: (*that is to say*), the term "letter" shall include packet, and the term "packet" shall include letter; and the expression "Lords of the Treasury" shall

mean the Lord High Treasurer of the United Kingdom of *Great Britain* and *Ireland*, or the Lords Commissioners of her Majesty's Treasury of the United Kingdom of *Great Britain* and *Ireland*, or any three or more of them; and the term "mail" shall include every conveyance by which post letters are carried, whether it be a coach, or cart, or horse, or any other conveyance; and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term "packet-boat;" and the term "mail-bag" shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed, whether it does or does not contain post letters; and the term "master of a vessel" shall include any person in charge of a vessel, whether commander, mate, or other person, and whether the vessel be a ship of war, or other vessel; and the expression "officer of the post-office" shall include the postmaster-general, and every deputy postmaster, agent, officer, clerk, letter-carrier, guard, post-boy, rider, or any other person employed in any business of the post-office, whether employed by the postmaster-general, or by any person under him, or on behalf of the post-office; and the term "packet-letter" shall mean a letter transmitted by a packet boat; and the expression "person employed by or under the post-office" shall include every person employed in any business of the post-office, according to the interpretation given to officer of the post-office; and the terms "packet-boats" and "post-office packets" shall include vessels employed by or under the post-office or the admiralty, for the transmission of post letters, and also ships or vessels (though not regularly employed as packet-boats) for the conveyance of post-letters under contract, and also a ship of war or other vessel in the service of her Majesty, in respect of letters conveyed by it; and the term "postage" shall mean the duty chargeable for the transmission of post-letters; and the term "post-town" shall mean a town where a post-office is established (not being a penny or twopenny, or convention post-office); and the term "post letter bag" shall include a mail-bag or box, or packet or parcel, or other envelope or covering in which post letters are conveyed, whether it does or does not convey post letters; and the term "post letter" shall mean any letter or packet transmitted by the post, under the authority of the postmaster-general; and a letter shall be deemed a post-letter from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed; and the delivery to a letter carrier, or other person authorized to receive letters for the post shall be a delivery to the post-office; and a delivery at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter, according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed; and the term "post-office" shall mean any house, building, room, or place where post letters are received or delivered, or in which they are sorted, made up, or despatched; and the term "postmaster-general" shall mean any person or body of persons executing the office of postmaster-general for the time being, having been duly appointed to the office by her Majesty; and the terms "post-office acts," and "post-office laws," shall mean all acts relating to the management of the post, or to the establishment of the

post-office, or to postage duties, from time to time in force; and the term "United Kingdom" shall mean the United Kingdom of *Great Britain* and *Ireland;* and the term "valuable security" shall include the whole or any part of any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain*, or of *Ireland*, or of any foreign state, or in any fund of any body corporate, company, or society, to any deposit in any savings bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order, or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or order for the delivery or transfer of any goods or valuable thing; and every officer mentioned shall mean the person for the time being executing the functions of that officer; and whenever in this act, or the schedules thereto, with reference to any person, or matter, or thing, or to any persons, matters, or things, the singular or plural number, or the masculine gender only is expressed, such expression shall be understood to include several persons, or matters, or things, as well as one person, or matter or thing, and one person, matter, or thing, as well as several persons, or matters, or things, females as well as males, bodies politic or corporate as well as individuals, unless it be otherwise specially provided, or the subject or context be repugnant to such construction.

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*Indictment against an Officer of the Post-Office for opening or delaying letters.*

Middlesex to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, being then a person employed by and under the post-office of the United Kingdom, at the parish aforesaid, in the county aforesaid, did then and there unlawfully and contrary to his duty open ("*open or procure or suffer to be opened*") [*or*, unlawfully and wilfully detain ("*detain or delay, or procure or suffer to be detained or delayed*")] a post letter, the property of the postmaster-general, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The property may be laid in the "postmaster-general," and it is not necessary to allege or prove any value, or to state the nature of the defendant's employment.* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 40. *It does not seem to be necessary to negative the exceptions contained in the proviso, for the proviso is distinct and the prohibition general.* (*See ante, p.* 52). *As to the venue, see ante, p.* 19, *and* 7 *W.* 4 1 *Vict. c.* 36, *s.* 37, (*ante, p.* 218).

*Misdemeanor, fine, or imprisonment,* (*with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 42, *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169), *or both.* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 25.

*Evidence.*

Prove that the defendant was at the time of the commission of the offence a person employed by or under the post-office of the United Kingdom. For this purpose evidence of his acting as such is sufficient, without proving his appointment. *R.* v. *Evan Rees,* 6 *C.* & *P.* 606; *see Reg.* v. *Townsend, C.* & *Mar.* 178. Then prove that the defendant opened the letter, or delayed it, according to the allegation in the indictment. The defendant may prove, in answer to the charge, any of the circumstances specified in the proviso, and which would authorise him to open or detain the letter.

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*Indictment against an Officer of the Post-Office for stealing or embezzling Letters.*

*Commencement as in the last precedent*]—in the county aforesaid, feloniously did steal, take, and carry away, [*or*, feloniously, for the purpose of (*stating the purpose*), ("*any purpose whatever*") did embezzle, ("*embezzle, secrete or destroy*")] one post letter, the property of the postmaster-general, containing therein one bill of exchange ("*any chattel, or money, or valuable security*") for the payment of ten pounds*, the property of the postmaster-general; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

* *This allegation may be omitted, if the letter did not contain any chattel, money, or valuable security. The property may be laid in the "postmaster-general," and it is not necessary to allege or prove any value, or to state the nature of the defendant's employment.* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 40. *As to the venue, see ante, p.* 19; *and* 7 *W.* 4 & 1. *Vict. c.* 36, *s.* 37, (*ante, p.* 218). *An indictment for stealing and embezzling votes, &c., newspapers, Id. s.* 32, *may easily be framed from the above precedent.*

*Felony. If the letter contain any chattel, money, or valuable security, transportation for life,* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 26, *or for not less than seven years, or imprisonment not exceeding four years, Id. s.* 41, *with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, Id. s.* 42, *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*If the letter do not contain any chattel, money, or valuable security, transportation for seven years, or imprisonment not exceeding three years,* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 26, *with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, Id. s.* 42, *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*Evidence.*

Prove that the defendant was at the time he committed the offence employed under the post-office. *See R.* v. *Evan Rees,* 6 *C.* & *P.* 606, *suprà.* Then prove that he stole the letter, with its contents;

(*see ante, p.* 170 *et seq.*); or that he embezzled, secreted, or destroyed it for the purpose stated in the indictment. It is not necessary to prove that the letter or valuable security was of any value. The secreting, by a letter carrier, of a letter written by an inspector of the post-office for the purpose of trying the defendant's honesty, was held not to be a stealing of a post letter within the statute; but it was held that he might be convicted of simple larceny, in stealing a sovereign inclosed by the inspector in such letter, the sovereign being one of those which are occasionally found on the floor of the post-office, having dropped out of letters, and which are carried to a fund which is under the direction of the postmaster-general; and that such sovereign might be described as the property of the postmaster-general. *Reg.* v. *Rathbone*, 2 *Mood. C. C.* 242; *C. & Mar.* 220. So also, where a fictitious letter was sent, with money in it, to try the honesty of a country postmaster. *Reg.* v. *Gardner*, 1 *C. & K.* 628. Where a servant who was sent with a letter, and a penny to pay the postage, finding the door of the receiving-house shut, put the penny inside the letter, fastened it by means of a pin, and then put the letter into the unpaid letter-box; it was held that a messenger in the post-office, who stole this letter with the penny in it, might be convicted of stealing a post letter containing money, though the money was not put in for the purpose of being conveyed by post to the person to whom the letter was addressed. *Reg.* v. *Mence*, *C. & Mar.* 234. But where, the post-office being at an inn, the person sent to put a letter, containing bank-notes, into the post, took it to the inn, with money to pre-pay the postage, and laid the letter, and the money on it, upon a table in the lobby of the inn, in which the letter-box was, and pointed out the letter to a female servant at the inn (not authorised to receive letters), who said "she would give it to them;" and she stole the letter and its contents; it was held that this was not a post letter, within the 27th or 28th section of the statute, and that the defendant could be convicted only of larceny. *Reg.* v. *Harley*, 1 *C. & K.* 89.

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### *Indictment for stealing Money, &c. out of Letters.*

*Commencement as ante, p.* 169]—in the county aforesaid, one bill of exchange for the payment of ten pounds, ("*any chattel, money, or valuable security*"), the property of the postmaster-general, from and out of a post letter then and there being found, then and there feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The property may be laid in the "postmaster-general," and it is not necessary to allege or prove the security to be of any value.* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 40. *As to the venue, see ante, p.* 19, *and* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 37, (*ante, p.* 218).

*Felony, transportation for life,* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 27, *or for not less than seven years, or imprisonment not exceeding four years, Id. s.* 41, *with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement, Id. s.* 42, *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*Evidence.*

Prove a larceny of the chattel, money, or valuable security, out of the letter, either directly or by circumstances from which it may be inferred. The mere larceny of money, &c., from a letter will not suffice to bring the case within this statute, for a post letter means a letter or packet transmitted by the post, and it is only a post letter from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed. *See Reg.* v. *Rathbone*, (*ante*, *p.* 223). A delivery to a letter-carrier, or other person authorised to receive letters for the post, is a delivery to the post-office; and a delivery at the house or office of the person to whom the letter is addressed, or to him, or his servant or agent, or other person, considered to be authorised to receive the letter according to the usual manner of delivering that person's letters, is a delivery to the person addressed. 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 47. The words of the statute are "every person," which include those employed by the post-office as well as others; for although it was once doubted, *R.* v. *Scutt*, 1 *Leach*, 106; 2 *Leach*, 904: *R.* v. *Pooley*, *R. & R.* 31, whether persons employed by the post-office were within similar words in the repealed statute, 52 *G.* 3, *c.* 143, *s.* 3, those cases are now overruled. *R.* v. *Brown*, *R. & R.* 32. *See R.* v. *Salisbury*, 5 *C. & P.* 155.

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*Indictment for stealing, &c., Letters, &c.*

*Commencement as ante*, *p.* 169]—in the county aforesaid, feloniously did steal, take, and carry away one post letter, ("*a post letter bag or post letter*"), the property of the postmaster-general, from a post letter bag ("*a post letter bag, or a post-office, or an officer of the post-office, or a mail*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The property may be laid in the "postmaster-general," and it is not necessary to allege or prove any value. As to the venue, see ante, p.* 19. *An indictment for stealing letters out of a post-office packet may easily be framed for the above precedent.* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 29.

*Felony, transportation for life*, 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 28, *or for not less than seven years, or imprisonment not exceeding four years, Id. s.* 41, *with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement, Id. s.* 42, *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante*, *p.* 169).

*Evidence.*

Prove the larceny of the letter, as directed *ante*, *p.* 170 *et seq.* Where the defendant obtained the mail bags from the post-office, pretending that he was the mail guard, and then ran away with them; the jury being of opinion that he got possession of them with intent to steal them, found him guilty; and the judges held the conviction to be right. *R.* v. *Pearce*, 2 *East*, *P. C.* 603. In this case the property did not pass, for the postmaster had no property in the mail bags to part with. Taking the mail bags off the horse during the

momentary absence of the person employed to carry them, was holden to be a taking from his possession, within the meaning of the repealed statute, 52 *G.* 3, *c.* 14, *s.* 3. *R.* v. *Robinson*, 2 *Stark. N. P.* 485.

The definition of a post letter has already been given, *ante, p.* 220. For the definition of the terms "letter," "packet," "mail," "mail bag," "officer of the post-office," "post letter bag," &c., *see* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 47, (*ante, p.* 219).

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*Indictment for stopping Mails, with Intent to rob, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain mail for the conveyance of post letters, then and there being, then and there feloniously did stop, with intent the same then and there feloniously to search, ("*rob or search*"), against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. As to the venue, *see ante, p.* 19, *and* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 37, (*ante, p.* 218).

*Felony—see the last precedent.*

*Evidence.*

Prove that the defendant stopped the mail, and prove the intent by circumstances from which it may be inferred. If the defendant actually robbed or searched the mail, his original intent so to do will be put beyond doubt.

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*Indictment for retaining Letters after Delivery.*

*Commencement as ante, p.* 169]—in the county aforesaid, unlawfully and fraudulently did retain ("*shall fraudulently retain or wilfully secrete, or keep or detain, or being required to deliver up by any officer of the post-office, shall neglect or refuse to deliver up*") a certain post letter, the property of the postmaster-general, which ought to have been delivered to a certain other person, to wit, one J. N., ("*or a post letter, or post letter bag, which shall have been sent*"), against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The property may be laid in the postmaster-general,* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 40, (*ante, p.* 219). *As to the venue, see ante, p.* 19.

*Misdemeanor, fine, and imprisonment,* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 31, *with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement, Id. s.* 42; *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*Evidence.*

This is a new provision, intended to meet the case of *R.* v. *Mucklow*, 1 *Mood. C. C.* 160, (*ante, p.* 187). Prove that the letter ought to have been delivered to J. N.; that it was delivered to the defendant, and was retained by him, as stated in the indictment. If the defendant secretes, or keeps, or detains the letter after request

to deliver it up by an officer of the post-office, it may be presumed that he does so wilfully, unless, at the time of the refusal to deliver it up, he gives some *bonâ fide* excuse for so doing. To make out a fraudulent retainer, however, it must be shewn, from the contents of the letter or other circumstances, that the defendant well knew the letter was not intended for him. It will be no defence that the letter or letter bag was found by the defendant, or any other person. 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 31.

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### *Indictment for procuring the Commission of Offences against the Post-Office.*

*Commencement as ante, p.* 169.]—in the county aforesaid, unlawfully did solicit ("*solicit or endeavour to procure*") one J. S., then being a person employed by and under the post-office of the United Kingdom, unlawfully and contrary to his duty to open a post letter, the property of the postmaster-general, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *From this and the foregoing precedents an indictment may easily be framed for procuring the commission of any "felony or misdemeanor, punishable by the Post-Office Acts." As to the venue, see ante, p.* 19.

*Misdemeanor, imprisonment not exceeding two years,* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 36, *with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement, Id. s.* 42; *such confinement, not exceeding one month at any one time, nor three months in any one year;* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

### *Evidence.*

Prove that the defendant solicited or endeavoured to procure the commission of the offence stated. It is immaterial whether the offence was completed or not.

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## STEALING FROM A WRECK.

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### *Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 8]—Enacts, that whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind, belonging to such ship or vessel, and be convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.

Sect. 10—*Place and Mode of Imprisonment*]—Enacts, that where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for

the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

### *Indictment.*

Sussex, to wit:—The jurors for our lady the Queen upon their oath present, that, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of ——, in the county aforesaid, a certain ship, ("*any ship or vessel*"), the property of a person or persons to the jurors aforesaid unknown, was stranded ("*in distress, or wrecked, stranded, or cast on shore*"), and that J. S., late of the parish aforesaid, in the county aforesaid, labourer, then and there, with force and arms, ten pieces of oak plank, ("*any part of any ship,*" *&c.*), of the value of five shillings, being parts of the said ship, [*or*, twenty pounds weight of cotton, ("*any goods, merchandise, or articles of any kind*"), of the value of twenty shillings, of the goods and merchandise of a person or persons to the jurors aforesaid unknown, belonging to the said ship], so then and there stranded as aforesaid, then and there feloniously did plunder, steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *You may add a second count, stating the ship to have been* "in distress;" *a third count stating the ship to have been* "wrecked;" *and a fourth count, stating the ship to have been* "cast on shore." *If the name of the ship be known, it should be stated in the indictment; and if the name of the owner be known, the ship should be described as his property. As to the venue, see ante, p.* 19.

*Felony, transportation for not more than fifteen nor less than ten years, or imprisonment,* 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 8, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 10.

### *Evidence.*

Prove that the ship or vessel in question was stranded or cast on shore, &c., as described in the indictment; if the name of the owner of the ship be stated, prove that she was his property; and prove the larceny of the goods as directed *ante, p.* 170 *et seq.*, whilst she was stranded and cast on shore; that the goods were part of or belonging to the ship, as stated in the indictment; and if the name of the owner of the goods be stated, prove them to be his property.

## HUNTING OR STEALING DEER IN INCLOSED PLACES.

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### *Statute.*

7 & 8 *Geo.* 4, *c.* 29, *s.* 26]—Enacts, that if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land wherein deer shall be usually kept, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny ; (*ante, p.* 168) ; and if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, he shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet ; and if any person, who shall have been previously convicted of any offence relating to deer, for which a pecuniary penalty is by this act imposed, shall offend a second time, by committing any of the offences hereinbefore last enumerated, such second offence, whether it be of the same description as the first offence or not, shall be deemed felony, and such offender, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. (*Ante, p.* 168).

Sect. 27]—Enacts, that if any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall, by virtue of a search-warrant to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds ; and if any such person shall not, under the provisions aforesaid, be liable to conviction, then for the discovery of the party who actually killed or stole such deer, it shall be lawful for the justice, at his discretion, as the evidence given and the circumstances of the case shall require, to summon before him every persons through whose hand such deer, or the head, skin, or other part thereof shall appear to have passed ; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned.

Sect 28]—Enacts, that if any person shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer

shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet.

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### *Indictment for hunting or stealing Deer in inclosed Places.*

*Commencement as ante, p.* 169]—in the county aforesaid, in certain inclosed land (*"in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept"*), there situate, in the occupation of J. N., wherein deer had been and then were usually kept, one fallow deer, of the price of forty shillings, the property of the said J. N., then and there kept and being, then and there in the said inclosed land, unlawfully, wilfully, and feloniously did hunt, kill, and carry away (*"course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound"*); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, punishable as simple larceny,* 7 & 8 *G.* 4, *c.* 29, *s.* 26. (*See ante, p.* 168).

### *Evidence.*

To support this indictment, you must prove the hunting, killing, or stealing of the deer, as stated in the indictment; that the land in which the offence was committed was at the time inclosed; in the occupation of J. N., situate as in the indictment; and that deer had been and then were usually kept therein.

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### *Indictment for hunting or stealing Deer in uninclosed Places, after a previous Conviction.*

*Commencement as ante, p.* 208, *setting out the conviction, to the words*]—her crown and dignity; and the said J. P. therefore adjudged the said J. S., for his said offence, to forfeit and pay the sum of fifty pounds, and also to pay the sum of ten shillings for costs; and, in default of immediate payment, to be imprisoned in ——, there to be kept to hard labour for the space of —— calendar months, unless the said sums should be sooner paid [*following the conviction*]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, labourer, being so convicted, afterwards, on the third day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, in a certain uninclosed part of the said chase, there situate, (*"in the uninclosed part of any forest, chase, or purlieu"*), one other fallow deer, of the price of forty shillings, then and there being, then and there, in the said last-mentioned uninclosed part of the said chase, unlawfully, wilfully, and feloniously did hunt, kill, and carry away (*"course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound"*); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*To course, &c., deer kept or being in the uninclosed part of any forest, &c., after a previous conviction for any offence relating to deer, for which a pecuniary penalty is imposed, whether the second offence be of the same description as the first or not, is deemed felony, punishable as simple larceny.* (*See ante, p.* 168). 7 & 8 *G.* 4, *c.* 29, *s.* 26. *The offences relating to deer, for which a pecuniary penalty is imposed, are: First, the coursing, hunting, snaring, or carrying away, or killing, or wounding, or attempting to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, for the first time.* 7 & 8 *G.* 4, *c.* 29, *s.* 26. *Secondly, the being in possession of, or knowingly having upon the premises, any deer, or the head, skin, or other part thereof, or any engine or snare for the taking of deer. Id. s.* 27. *Lastly, the setting or using any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether inclosed or not, or in any bank or fence dividing the same from any land adjoining, or in any inclosed land where deer are usually kept, or destroying any part of the fence of any land where any deer shall be then kept. Id. s.* 28.

*Evidence.*

To support this indictment, you must prove the previous conviction, as directed *ante, p.* 125—the identity of the defendant—the hunting, killing, or stealing of the deer by the defendant, as stated in the indictment—the commission of the offence in an uninclosed part of the chase, as described, and the locality of that part of the chase in which the offence was committed.

The prisoner may take exception to the validity of the previous conviction, and if it be bad, he cannot be convicted upon this indictment. *R.* v. *Allen, R. & R.* 513.

Where a summary conviction for an offence relating to a deer did not state substantively where the place was situate in which the offence was committed, but in awarding the distribution of the penalty gave it to the overseers of D., in the said county, "where the said offence was committed," it was holden good. *R.* v. *Weale,* 5 *C & P.* 135.

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TAKING OR KILLING HARES OR CONIES IN WARRENS, &C., IN THE NIGHT-TIME.

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*Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 30]—Enacts, that if any person shall unlawfully and wilfully, in the night-time, take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly: and if any person shall unlawfully and wilfully in the day-time take or kill any hare or coney in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or conies, every such offender, being convicted thereof before a justice of the peace, shall

forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet; provided always, that nothing herein contained shall affect any person taking or killing in the day-time any conies on any sea-bank or river-bank in the county of *Lincoln*, so far as the tide shall extend, or within one furlong of such bank.'

### *Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, about the hour of eleven in the night of the same day, in a certain warren and ground, ("*in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not*"), in the occupation of J. N., there situate, the said warren and ground then and there being lawfully used for the breeding and keeping of hares [*or*, conies], twenty hares then and there being found, then and there in the said warren and ground unlawfully and wilfully did take, ("*take or kill*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count for taking conies, if it be necessary.*

*Misdemeanor, fine, or imprisonment, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169): *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169), *or both.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 30.

### *Evidence.*

To support this indictment, you must prove—1*st.* That the defendant took or killed the hares (or conies) in the place mentioned in the indictment. "Taking," in the statute, means "catching," and not taking away. Where a defendant, who set several wires in a warren, in one of which a coney was caught, was seized just as he was laying hold of the wire to take the coney, which was then alive; the judges held this to be a taking within the meaning of the statute. *R.* v. *Glover, R. & R.* 269.—2*nd.* That the offence was committed in the night-time, as in the case of burglary before, 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 4; for this statute does not, like the stat. 9 *G.* 4, *c.* 69, define what shall be deemed to be night.—3*rd.* That the place in which the defendant took the hares (or conies) was a warren or ground then used for the breeding or keeping of hares (or conies); that it was in the occupation of J. N., and is situate as described in the indictment. It is immaterial whether the warren or ground was inclosed or not.

The statute does not apply to taking or killing in the day-time any conies on any sea-bank or river-bank in the county of *Lincoln*, so far as the tide shall extend, or within one furlong of such bank.



## TAKING OR DESTROYING FISH IN WATER ADJOINING A DWELLING-HOUSE.

### *Statute.*

*7 & 8 G. 4, c. 29, s. 34*]—Enacts, that if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person, being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet; provided always, that nothing hereinbefore contained shall extend to any person angling in the day-time; but if any person shall, by angling in the day-time, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is hereinbefore mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.

### *Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, in a certain stream of water ("*any water*") then and there running and being in certain land ("*any land adjoining to or belonging to the dwelling-house*") adjoining [*or*, belonging] to the dwelling-house of J. N., there situate, the said J. N. then and there being the owner of the said water, [*or*, the said J. N. then and there having a right of fishery in the said water], thirty fish called carp, of the price of five shillings; thirty fish called tench, of the price of five shillings; and thirty fish called trout, of the price of five shillings, then and there being found, in the said stream of water, then and there unlawfully and wilfully did take [*or*, destroy]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Where the indictment alleged the fish to be the goods and chattels of the prosecutor, the judges held that these words might be rejected as surplusage. R.* v. *Hundsdon,* 2 *East, P. C.* 611.

*Misdemeanor, fine, or imprisonment,* (*with or without hard labour for the whole or any part of the imprisonment, and with or without solitary*

*confinement*, 7 & 8 *G.* 4, *c.* 29, *s.* 4, (*ante*, *p.* 169); *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante*, *p.* 169), *or both.* 7 & 8 *G.* 4, *c.* 29, *s.* 34.

*Evidence.*

Prove the taking or destruction of the fish mentioned, or some of them. The taking need not be such a taking as would be necessary to constitute larceny. *See R.* v. *Glover*, *R.* & *R.* 269, (*ante*, *p.* 231). But a taking by angling in the day-time will not be sufficient. 7 & 8 *G.* 4, *c.* 29, *s.* 34. If a destruction only be charged, it must be proved to have been wilful. Prove, also, that the fish were taken or destroyed in a stream (or water) running or being in land adjoining to, *see R.* v. *Hodges*, (*ante*, *p.* 207), or belonging to, the dwelling-house of J. N., and which at the time belonged to J. N., or in which he had a right of fishery. The local situation of the dwelling-house and water must also be proved; but if the boundary of any parish, township, or vill, happen to be in or by the side of the water, it will be sufficient to prove that the offence was committed either in the parish, &c., named in the indictment, or in the parish, &c., adjoining thereto. 7 & 8 *G.* 4, *c.* 29, *s.* 34.

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STEALING OR DREDGING FOR OYSTERS, &C.

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*Statute.*

7 & 8 *Geo.* 4, *c.* 29, *s.* 36]—Enacts, that if any person shall steal any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, every such offender shall be deemed guilty of larceny, and being convicted thereof, shall be punished accordingly; (*ante*, *p.* 168); and if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and being convicted thereof, shall be punished by fine or imprisonment, or both, as the court shall award; such fine not to exceed twenty pounds, and such imprisonment not to exceed three calendar months; and it shall be sufficient in any indictment or information to describe, either by name or otherwise, the bed, laying, or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided always, that nothing herein contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine, adapted for floating fish only.

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*Indictment for stealing Oysters or Oyster Brood.*

*Commencement as ante*, *p.* 169]—in the county aforesaid, from a certain oyster bed ("*any oyster bed, laying, or fishery, being the property*

*of any other person, and sufficiently marked out or known as such"*), called ——, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., one thousand oysters, of the value of twenty shillings, then and there being found, then and there feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It is sufficient to describe, either by name or otherwise, the bed, laying, or fishery, in which the offence is committed, without stating the same to be in any particular parish, township, or vill.*

*Larceny, punishable as such.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 36. (*See ante, p.* 168).

*Evidence.*

Prove a larceny of the oysters or some of them, as directed *ante, p.* 170 *et seq.* Prove, also, that the place from whence they were taken was at the time the oyster bed, laying, or fishery of J. N., and was sufficiently marked out or known as such.

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*Indictment for using a dredge, &c., in the Oyster Fishery of another.*

*Commencement as ante, p.* 169]—in the county aforesaid, within the limits of a certain oyster bed ("*any oyster bed, laying, or fishery*"), called ——, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., unlawfully and wilfully did use a certain dredge ("*any dredge, net, instrument, or engine whatsoever*") for the purpose then and there of taking oysters ("*oysters or oyster brood*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *See the last precedent.*

*Misdemeanor, punishable by fine, not exceeding twenty pounds, or imprisonment, not exceeding three months,* (*with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169)), *such confinement not exceeding one month at any one time.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169), *or both.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 36.

*Evidence.*

Prove that the defendant used a dredge, &c. within the limits of the oyster bed, &c. of J. N., as stated in the indictment; and that such oyster bed, &c. was at the time the property of J. N., and was sufficiently [marked out and] known as such. The purpose is to be inferred from the act, and it is immaterial whether the defendant actually took any oysters or oyster brood or not. The statute does not apply to persons catching or fishing for any floating fish within the limits of an oyster fishery, with any net, instrument, or engine adapted for taking floating fish only. 7 *&* 8 *G.* 4, *c.* 29, *s.* 36.

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*Indictment for dragging upon the Ground of the Oyster Fishery of another.*

*Commencement as ante, p.* 169]—in the county aforesaid, upon the ground ("*ground or soil*") of a certain oyster bed ("*any oyster*

*bed, laying, or fishery*") called ——, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., with a certain net ("*any net, instrument, or engine*") unlawfully and wilfully did drag; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor; see the last precedent.* 7 & 8 *G.* 4, *c.* 29, *s.* 36.

*Evidence.*

Prove that the defendant dragged with a net, &c., upon the ground of the oyster bed, &c., as stated in the indictment; and that such oyster bed, &c., was at the time the property of J. N., and was sufficiently [marked out and] known as such. The statute does not apply to persons catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only. 7 & 8 *G.* 4, *c.* 29, *s.* 36.

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## LARCENY BY LODGERS.

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*Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 45]—For the punishment of depredations committed by tenants and lodgers, be it enacted, that if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; (*ante, p.* 168); and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny; and in every such case of stealing any fixture, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

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*Indictment.*

The indictment for stealing a chattel will be in the form *ante, p.* 168, and for stealing a fixture, in the form *ante, p.* 211. The article stolen must be described as the property of the landlord; and in the latter case the dwelling-house or lodging must, according to circumstances, be described as the dwelling-house of the defendant, or of the landlord, as in burglary.

*Felony, punishable as simple larceny.* 7 & 8 *G.* 4, *c.* 29, *s.* 45, (*ante, p.* 168).

*Evidence.*

Prove a larceny of the chattel mentioned in the indictment, as directed *ante, p.* 170 *et seq.*: or, if the indictment allege that the defendant stole a fixture, prove the allegations of that indictment, as directed *ante, p.* 212. Independently of the statute, the contract of

letting, and that the goods were in his possession under that contract, would be matter of defence for the defendant; but as that circumstance would now be no defence, it is immaterial whether the contract of letting be proved or not.

## BREAKING AND ENTERING A CHURCH OR CHAPEL, AND STEALING THEREIN.

### *Statute.*

*7 & 8 G. 4, c. 29, s. 10*]—Enacts, that if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon.

6 & 7 *Will.* 4, *c.* 4]—*Recites the* 5 & 6 *Will.* 4, *c.* 81, *which, after reciting the* 7 & 8 *G.* 4, *c.* 29, *s.* 10, *altered the punishment for sacrilege;* and enacts, that all persons who may hereafter be duly convicted of any of the offences mentioned in the said act, shall and may be sentenced by the court or judge by or before whom such offenders may be tried to transportation for life or for any term of years not less than seven, or to be imprisoned for any term not exceeding three years, with or without hard labour, and for any period of solitary confinement during such imprisonment, at the discretion of such court or judge. *But see* 7 *Will.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

### *Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, the church of the said parish [*or*, a certain chapel] ("*any church or chapel*"), there situate, feloniously did break and enter, and then and there in the said church, one silver cup ("*any chattel*") of the value of six pounds, of the chattels of the parishioners of the said parish, in the said church then and there being found, then and there feloniously and sacrilegiously did steal, take, and carry away; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*If a chapel which is private property be broken and entered, lay the property as in other cases of larceny.*

*If a parish church be broken and entered, add a count stating the chattel to be the chattel of the rector, and another stating it to be the chattel of the churchwardens. See* 1 *Hale,* 51, 22; *Id.* 81; 2 *East, P. C.* 681.

*Felony,* 7 & 8 *G.* 4, *c.* 29, *s.* 10; *transportation for life, or not less than seven years, or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement;* 6 & 7 *Will.* 4, *c.* 4; *such confinement not exceeding one month at any time, nor three months in any one year.* 7 *Will.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove that the defendant broke and entered the church or chapel described in the indictment, in the same manner as in burglary, (*post, Sect.* 4), except that it need not be proved to have been done in the night-time. The vestry is part of the church for this purpose. *Reg.* v. *Evans, C. & Mar.* 298. If the evidence fail in this respect, the defendant may be convicted of simple larceny. Then prove the larceny, as directed *ante, p.* 170 *et seq.* The words "any chattel" would probably be held to extend to articles in a church or chapel, though not used for divine service; for the words "any goods" in the repealed statute 1 *Ed.* 6, *c.* 12, were held not to be confined to goods used for divine service, but to extend to articles used in the church to keep it in repair, as a pot used to hold charcoal for airing the vaults, and a snatch-block used to raise weights if the bells wanted repair. *R.* v. *Rourke, R. & R.* 386. The allegation of property in the parishioners, rector, or churchwardens, will be sufficiently proved by evidence that the church is a parish church; but the property in goods in a chapel must be proved as in ordinary cases. Upon an indictment for stealing goods from a dissenting chapel, the first count of the indictment described them as the property of the trustees of the chapel, and the second as the property of a person who was employed to take care of the chapel, kept the keys of the chapel, and received a salary for so doing; the first count was not proved, and the judges held that the second could not be sustained, because the goods could not be considered as belonging to the chapel-keeper. *R.* v. *Hutchinson, R. & R.* 412. Where a prisoner was indicted for stealing a Bible, a hymn-book, and a pair of brass sconces, the property of J. B. and others, which it appeared had been stolen from a Methodist chapel at Fakenham, and the Bible and hymn-book had been presented to the Society of Methodists there, of which J. B. was one, and also a trustee of the chapel, but the trust-deed was not produced, *Parke,* J. held, that as J. B. was one of the society, the property was well laid in him. *R.* v. *Boulton,* 5 *C. & P.* 537. Lastly, prove that the church or chapel is situate as described in the indictment.

The word "chapel" in the statute has been construed not to apply to chapels of dissenters. Where the prisoner was indicted for breaking and entering a chapel, which appeared from the evidence to be a dissenting chapel, *Gaselee,* J., and *Vaughan,* B., held that the statute applied only to chapels of the church of England; because where the legislature meant to protect the chapels of dissenters, they expressly mention them, as in the stat. 7 *&* 8 *G.* 4, *c.* 30, *s.* 2. *R.* v. *Warren,* 6 *C. & P.* 335, *n.*: *see also R.* v. *Nixon,* 7 *C. & P.* 442.

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### *Indictment for stealing in and breaking out of a Church or Chapel.*

*Commencement as ante, p.* 169] —in the county aforesaid, one silver cup, of the value of six pounds, of the chattels of the parishioners of the said parish, in the church ("*church or chapel*") of the said parish there situate, then and there being found, then and there in the said church feloniously did steal, take, and carry away; and that

the said J. S., so being in the said church as aforesaid, and having then and there committed the said felony in the said church as aforesaid, afterwards, and after he had so committed the said felony in the said church as aforesaid, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously did break out of the said church, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *See the last precedent.*

*Felony.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 10. *See the last precedent.*

*Evidence.*

Prove the larceny, as directed in the last case; prove the breaking out, as in burglary, (*post, Sect. IV*), except that it need not be proved to have been done in the night-time; and prove the local situation of the church or chapel, as described in the indictment.

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## HOUSEBREAKING, &c.

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*Statutes.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 12]—Enacts, that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever; or shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more, every such offender, being convicted thereof, shall suffer death as a felon.

*Sect.* 13]—Provides and enacts, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, should be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 1]—*Recites the stat.* 2 *&* 3 *W.* 4, *c.* 62, *s.* 1, *whereby, after reciting the* 7 *&* 8 *G.* 4, *c.* 29, *s.* 12, *the punishment of death for stealing in a dwelling-house to the value of five pounds was altered to transportation for life; and the stat.* 3 *&* 4 *W.* 4, *c.* 44, *ss.* 1 *and* 2, *which, after reciting the* 7 *&* 8 *G.* 4, *c.* 29, *ss.* 12 *and* 13, *altered the punishment for breaking and entering in a dwelling-house and stealing therein;* and enacts, that so much of the said act of 2 *&* 3 *W.* 4, as relates to the punishment of persons convicted of offences for which they are liable, under the said act, to be transported for life, and so much of the said act of 3 *&* 4 *W.* 4, as relates to the punishment of any person convicted of the offence of breaking and entering any dwelling-house and stealing therein, as in that act mentioned, shall, from and after the commencement of this act, be and the same are hereby repealed; and that, from and after the commencement of this act, (1st Oct. 1837), every person con-

victed of any of such offences shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.

7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 5]—Enacts, that whosoever shall steal any property in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.

*Sect.* 7, (*and see* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 3, *ante, p.* 198)—*Place and Mode of Imprisonment*]—Enacts, that where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

*Sect.* 9—*Construction of the Word "Property"*]—Enacts, that the word "property" shall throughout this act be deemed to denote everything included under the words "chattel, money, or valuable security," used in the 7 *&* 8 *G.* 4, *c.* 29. (*See ante, p.* 214).

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### *Indictment for Housebreaking.*

*Commencement as ante, p.* 169]—in the county aforesaid, the dwelling-house of J. N., there situate, feloniously did break and enter, and two pewter dishes, of the value of five shillings; one dressing-case, of the value of two pounds; and six chairs, of the value of thirty shillings, ("*chattel, money, or valuable security,*" *see* 7 *&* 8 *G.* 4, *c.* 29, *s.* 5, (*ante, p.* 214), of the goods and chattels of the said J. N., in the said dwelling-house then and there being found, then and there in the said dwelling-house feloniously did steal, take, and carry away; against the form of the statute in such cases made and provided, and against the peace of our lady the Queen, her crown and dignity. *The indictment has been held sufficient without the words "in the said dwelling-house" before the words "feloniously did steal," &c. Reg.* v. *Andrews, C. & Mar.* 121, *overruling Reg.* v. *Smith,* 2 *M. & Rob.* 115, (*post, p.* 247). *An indictment is sustainable for a misdemeanor, which charges that the defendant unlawfully broke and entered the dwelling-house of J. N. with intent the goods and chattels in the said dwelling-house then and there being to steal, without stating whose goods he intended to steal. Reg.* v. *Lawes,* 1 *C. & K.* 62.

*Felony,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 12, *transportation for not more than fifteen nor less than ten years, or imprisonment not exceeding three years;* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 1; *with or without hard labour, and*

*with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 195).

### *Evidence.*

*The Dwelling-house of J. N.*]—This must be proved in the same manner as in burglary, (*see post, Sect.* 4). By stat. 7 *&* 8 *G.* 4, *c.* 29, *s.* 13, it is provided and enacted, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purposes of housebreaking, stealing in the dwelling-house, &c., unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

*Did break and enter.*]—This must be proved in the same manner as in burglary; 1 *Hale,* 526; *Fost.* 108; (*see post, Sect. IV*); except that it need not be proved to have been done in the night-time; but if it be proved to have been done in the night-time, so as to amount to burglary, the defendant may notwithstanding be convicted upon this indictment. *See R.* v. *Pearce, R.* v. *Robinson, ante, p.* 32.

*Then and there in the said Dwelling-house, &c.*]—There must be an actual, and not merely a constructive, taking, but in all other respects the larceny may be proved in the manner directed *ante, p.* 170 *et seq.* Where the prosecutor, in consequence of the threat of an armed mob, fetched provisions out of his house and gave them to the mob, who stood outside the door, this was holden not to be a stealing in the dwelling-house. *Reg.* v. *Leonard, Cheshire Special Commission,* 1842. Where it appeared that the prisoner, after breaking and entering the house, took two half-sovereigns from a bureau in one of the rooms, but, being immediately detected, threw them under the grate in that room; *Park,* J., held that this was a sufficient asportation to constitute a stealing within the meaning of this clause of the statute. *R.* v. *Amier,* 6 *C. & P.* 344. The value of the goods is immaterial, if a breaking and entry be proved.

If the prosecutor succeed in proving the larceny, but fail in proving any of the other circumstances above mentioned, the defendant may be convicted of simple larceny; or if the prosecutor fail in proving the breaking and entry, and the goods be laid and proved to be of the value of five pounds, the defendant may be convicted of stealing in the dwelling-house.

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### *Indictment for stealing in a Dwelling-house, some Person therein being put in Fear.*

*Commencement as ante, p.* 169]—in the county aforesaid, one silver bason, of the value of three pounds, and one coat, of the value of five shillings, ("*any property,*" 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 5, (*and see ante, p.* 239)), of the goods and chattels of J. N., in the dwelling-house of the said J. N. there situate, then and there being found, then and there in the said dwelling-house feloniously did steal, take,

and carry away; one J. L. and M. his wife then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house, and therein by the said J. S. by a certain menace and threat then used by the said J. S., then and there being put in fear, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The indictment must expressly allege that some person in the house was put in fear by the defendant. R.* v. *Etherington*, 2 *Leach*, 671; 2 *East, P. C.* 635.

*Felony, transportation for not more than fifteen nor less than ten years, or imprisonment not exceeding three years; 7 W. 4 & 1 Vict. c.* 86, *s.* 5; *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, and not exceeding three months in any one year. Id. s.* 7; (*ante, p.* 239).

*Evidence.*

Prove the larceny, as directed *ante, p.* 170 *et seq.* The value is immaterial, if some person was in the house at the time, and was put in fear by a menace or threat of the defendant; which may be either by words or gestures. *R.* v. *Jackson*, 1 *Leach*, 269. Then prove that the larceny was committed in the dwelling-house of J. N., situate as described in the indictment, or in some building occupied therewith, and connected or communicating therewith, either immediately or by means of a covered and inclosed passage. (*See the evidence in the last case*). Lastly, prove that the person mentioned in the indictment was in the house at the time, and was put in fear by the menaces or threats of the defendant or his accomplices. *R.* v. *Etherington*, 2 *Leach*, 671; 2 *East, P. C.* 635. On the former statutes, which did not require that the party should be put in fear *by a menace or threat*, it does not appear to have been settled whether it was necessary to prove an actual sensation of fear, but the practice has been, upon the repealed stat. 3 *W. & M. c.* 9, which for this purpose is the same as the other statutes, to require proof of actual fear, where the fact was committed out of the presence of the party, so as not to amount to a robbery at common-law, and it has been said, if the fact be committed in the presence of the party, to depend upon circumstances whether fear will or will not be implied; if the party in whose presence the property was taken was not conscious of the fact, no fear could be implied. *See* 2 *East, P. C.* 635. But now, by the express words of the statute, the putting in fear must be proved to have been by an actual menace or threat.

If the prosecutor fail to prove that the person mentioned in the indictment was in the dwelling-house, and was put in fear, the defendant may still be convicted of simple larceny; or if the goods stolen in the dwelling-house be laid and proved to be of the value of five pounds, he may be convicted of stealing in the dwelling-house.

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*Indictment for stealing in a Dwelling-house to the value of 5l.*

*Commencement as ante, p.* 169] — in the county aforesaid one silver sugar bason of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver teaspoons of the value of two pounds, ("*chattel money, or valuable security,*" *see* 7 *&* 8 *G.* 4, *c.* 29, *s.* 5, (*ante, p.* 213)), of the goods and chattels of one J. G., in the dwelling-house of J. N. there situate, then and there being found, then and there in the said dwelling-house feloniously did steal, take and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Where the indictment alleged that the defendant, at &c., stole certain goods "in the dwelling-house of W. T., then and there being," omitting the words* "there situate," *the judges held that the house must be considered as described of the place laid as special venue. R.* v. *Napper,* 1 *Mood. C. C.* 44; *and see R.* v. *Richards,* 1 *M. & Rob.* 177.

*Felony,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 12, (*ante, p.* 238); *transportation for not more than fifteen nor less than ten years, or imprisonment not exceeding three years;* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 1; *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 195).

*Evidence.*

Prove the larceny, as directed *ante, p.* 170 *et seq.* Prove it to have been committed in the dwelling-house of J. N., or in some building occupied therewith, and connected or communicating therewith, either immediately or by means of a covered and inclosed passage leading from the one to the other; (*see the evidence in the last case but one*); and prove the goods stolen to be of the value of five pounds or more.

If you fail to prove the larceny, the defendant must of course be acquitted altogether. If you fail to prove it to have been committed in a dwelling-house or some building communicating therewith, (such as burglary might be committed in, 2 *East, P. C.* 644; *and see post, Sect. IV*), or fail to prove that it was the dwelling-house of J. N., *R.* v. *White,* 1 *Leach,* 252: *R.* v. *Woodward, Id.* 253, *n.*; (*and see ante, p.* 41), or fail to prove the goods (stolen at any one time, *R.* v. *Petrie,* 1 *Leach,* 294: *see R.* v. *Hamilton, Id.* 348: *R.* v. *Jones,* 4 *C. & P.* 217: *R.* v. *Dunn, ante, p.* 59), to be of the value of five pounds, the defendant must be acquitted of the compound offence, and found guilty of the simple larceny only.

It had been held in several cases, that if a man steal the goods of another in his own house, *R.* v. *Thompson,* 1 *Leach,* 338, or a woman steal the goods of a stranger in the house of her husband, *R.* v. *Gould,* 1 *Leach,* 4, it is not within the statute, which was not intended to protect property which might be in a house from the owner of the house, but from the depredations of others, but these cases appear to be overruled by that of *Reg.* v. *Bowden,* 2 *Mood. C. C.* 285; 1 *C. & K.* 147, where all the judges agreed that stealing in a dwelling-house to the value of 5*l.*, by the owner of the house, was within the 7 *&* 8 *G.* 4, *c.* 29, *s.* 12. Where a lodger invited an acquaintance to sleep at

his lodgings without the knowledge of his landlord, and during the night stole his watch from the bed's head, it was doubted, at the trial, whether the lodger was not to be considered as the owner of the house with respect to the prosecutor; but the judges held, that the defendant was properly convicted of stealing in the dwelling-house. *R.* v. *Taylor, R. & R.* 418. So, if the goods be under the protection of the person of the prosecutor at the time they are stolen, the case will not be within the statute. As, for instance, where the defendant procured money to be delivered to him for a particular purpose, and then ran away with it; *R.* v. *Campbell,* 2 *Leach,* 264; (*ante p.* 183); and where the prosecutor, by the trick of ring-dropping, was induced to lay down his money upon a table, and the defendant took it up and carried it away; *R.* v. *Owen,* 2 *Leach,* 572; 2 *East, P. C.* 645; these cases were holden not to be within the statute. For a case to be within the meaning of the statute, it is necessary that the goods should be under the protection of the house, and be deposited in it for safe custody. But property left at a house for a person supposed to reside there, will be under the protection of the house, and the stealing of it will be within the statute. Two boxes belonging to A., who resided at 38, Rupert-street, were delivered by a porter (whether by mistake or design did not appear) at No. 33, in the same street; the owner of the house, imagining that they were for the defendant, who lodged there, delivered them to him; the defendant converted the contents of the boxes to his own use, and absconded; it was doubted at the trial whether the goods were sufficiently within the protection of the dwelling-house to bring the case within the statute, but the judges held that they were, and that the conviction for the capital offence was therefore correct. *R.* v. *Carroll,* 1 *Mood. C. C.* 89. So, if one, on going to bed, put his clothes and money by his bed-side, these are under the protection of the dwelling-house, and not of the person. *R.* v. *Thomas, Car. Sup.* 295. So, where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while he was asleep; this was held to be a stealing in the dwelling-house, and not a stealing from the person. *R.* v. *Hamilton,* 8 *C. & P.* 49. It is a question for the court, and not for the jury, whether goods are under the protection of the dwelling-house, or in the personal care of the owner. *R.* v. *Thomas, supra.*

## BREAKING, &C., A BUILDING WITHIN THE CURTILAGE AND STEALING THEREIN.

### *Statute.*

7 *& 8 G.* 4, *c.* 29, *s.* 14]—Enacts, that if any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof according to the provisions hereinbefore-mentioned, every such offender, being convicted thereof, either upon an indictment for the same

offence, or upon an indictment for burglary, house-breaking, or stealing to the value of five pounds in a dwelling-house, containing a separate count for such offence, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

7 *W.* 4 & 1 *Vict. c.* 90, *s.* 2]—*Recites* (*inter alia*) *the* 7 & 8 *G.* 4, *c.* 29, *s.* 14, and enacts, that so much of the said act as relates to the punishment of persons convicted of any of the offences hereinbefore specified, as in that act contained, shall from and after the commencement of this act be, and the same are hereby repealed; and every person convicted after the commencement of this act of any such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years. Sect. 3. (*See ante, p.* 195).

### *Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain building of one J. N., there situate, feloniously did break and enter, (the said building then and there being within the curtilage of the dwelling-house of the said J. N., there situate, and by the said J. N. then and there occupied therewith, and there being then and there no communication between the said building and the said dwelling-house, either immediate or by means of any covered and inclosed passage leading from the one to the other), and that the said J. S. then and there, in the said building, with force and arms, one silver watch of the value of forty shillings, ("*chattel, money, or valuable security,*" *see* 7 & 8 *G.* 4, *c.* 29, *s.* 5, *ante, p.* 213), of the goods and chattels of the said J. N., in the said building then and there being found, then and there in the said building feloniously did steal, take, and carry away; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *This count may be added to an indictment for burglary, house-breaking, or stealing in a dwelling-house to the amount of five pounds,* 7 & 8 *G.* 4, *c.* 29, *s.* 14, *and should be added whenever it is doubtful whether the building is in strictness a dwelling-house.*

*Felony,* 7 & 8 *G.* 4, *c.* 29, *s.* 14, *transportation for not more than fifteen nor less than ten years, or imprisonment not exceeding three years;* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 2; *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 195).

### *Evidence.*

To support this indictment, you must prove that the defendant broke and entered the building in question; that the building so broken and entered was occupied, at the time when the offence was committed, by J. N. with his dwelling-house, and was within the
endant there stole the goods &c.

enumerated in the indictment; and that the building is situate as described in the indictment.

The breaking and entering must be proved in the same manner as in burglary, (*post, Sect. IV*), except that it is immaterial whether it be done in the day or night. If this proof fail, the defendant may be convicted of simple larceny.

The building described in the statute is any building within the *curtilage* of a dwelling-house, and occupied therewith, not being part of the dwelling-house, that is, not communicating with the dwell-house, either immediately or by means of a covered and inclosed passage leading from the one to the other. To break and enter such a building was, before the present statute, burglary, or housebreaking; and although this enactment, which expressly defines the building meant thereby to be a building within the *curtilage*, appears to exclude many of those buildings which were formerly deemed parcel of the dwelling-house, from their adjoining to the dwelling-house and being occupied therewith, although not within any common inclosure or curtilage; yet some of the cases decided upon these subjects may afford some guide to the construction of the present section. Where the defendant broke into a goose-house, which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded, partly by other buildings of the homestead, and partly by a wall, in which there was a gate leading to the road, and some of the buildings had doors opening into the lane, as well as into the yard, the goose-house was holden to be part of the dwelling-house. *R.* v. *Clayburn, R. & R.* 360. Where the prosecutor's house was at the corner of the street, and adjoining thereto was a workshop, beyond which a coach-house and stable adjoined, all of which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, and was altogether inclosed, but the shop had no internal communication with the house, had a door opening into the street, and its roof was higher than that of the house; the workshop was holden to be a parcel of the dwelling-house. *R.* v. *Chalkling, R. & R.* 334. So, a warehouse, which had a separate entrance from the street, and had no internal communication with the dwelling-house, with which it was occupied, but was under the same roof, and had a back door opening into the yard, into which the house also opened, and which inclosed both, was holden to be part of the dwelling-house. *R.* v. *Lithgo, R. & R.* 357. So, where in one range of buildings the prosecutor had a warehouse and two dwelling-houses, formerly one house, all of which had entrances into the street, but had also doors opening into an inclosed yard belonging to the prosecutor; and the prosecutor let one of the houses between his house and the warehouse, together with certain easements in the yard; it was holden, that the warehouse was parcel of the dwelling-house of the prosecutor; it was so before the division of the house, and remained so afterwards. *R.* v. *Walters*, 1 *Mood. C. C.* 13. And where the dwelling-house of the prosecutor was in the centre of a space of about an acre of land, surrounded by a garden wall, the front wall of a factory, and the wall of the stable-yard, the whole being the property of the prosecutor, who used the factory, partly for his own business and partly in a business in which he had a partner; and the factory opened into an open passage, into which

the outer door of the dwelling-house also opened; it was holden that the factory was properly described as the dwelling-house of the prosecutor. *R.* v. *Hancock. R. & R.* 170: *see R.* v. *Eggington*, 2 *Leach*, 913; 2 *B. & P.* 508. But a building separated from the dwelling-house by a public thoroughfare cannot be deemed to be part of the dwelling-house. *R.* v. *Westwood, R. & R.* 495. So neither is a wall, gate, or other fence, part of the outward fence of the curtilage, and opening into no building, but into the yard only, part of the dwelling-house; *R.* v. *Bennett, R. & R.* 289; nor is the gate of an area, which opens into the area only, if there be a door or fastening to prevent persons from passing from the area into the house, although that door or other fastening may not be secured at the time. *R.* v. *Davis, R. & R.* 322. Where the building broken into was in the fold-yard of the prosecutor's farm, to get to which from the house it was necessary to pass through another yard called the pump-yard, into which the back door of the house opened, the pump-yard being divided from the fold-yard by a wall four feet high, in which there was a gate, and the fold-yard being bounded on all sides by the farm-buildings, a wall from the house, a hedge, and gates; it was held that the building was within the curtilage. *Reg.* v. *Gilbert*, 1 *C. & K.* 84.

From analogy to the cases of *R.* v. *Pearce* and *R.* v. *Robinson*, *ante, p.* 52, it would seem to be unnecessary to negative, in the indictment, that the building communicated with the dwelling-house, either immediately, or by means of a covered and inclosed way; and from the same analogy it would seem, that the defendant might be convicted upon this indictment, though the building should appear in fact to be part of the dwelling-house, and the evidence amount to a burglary. But as this point has not been directly decided, the analogy between this and the cases alluded to may be doubted; and the prosecutor should be prepared with evidence to prove that the building did not so communicate with the dwelling-house; and if it be doubtful whether the building be in fact part of the dwelling-house, a count should be added for burglary or house-breaking.

The larceny in the building must be proved in the same manner as upon an indictment for housebreaking, (*ante, p.* 239), or stealing in a dwelling-house, (*ante, p.* 240).

## BREAKING, &c., AND STEALING IN A SHOP, &c.

### *Statute.*

7 *& 8 G.* 4, *c.* 29, *s.* 15]—Enacts, that if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned. (*Sect. XIV, ante, p.* 243).

7 *W.* 4. *&* 1 *Vict. c.* 90, *s.* 2]—*Recites* (*inter alia*) *the* 7 *&* 8 *G.* 4,

*c.* 29, *s.* 15; *and enacts for this offence the same punishment as mentioned in the last precedent, ante, p.* 244.

*Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, the shop (" *shop, warehouse, or counting-house*") of J. N., there situate, feloniously did break and enter, and twenty yards of muslin, of the value of twenty shillings, (" *chattel, money, or valuable security,*" *see* 7 *&* 8 *G.* 4, *c.* 29, *s.* 5, *ante, p.* 215), of the goods and chattels of the said J. N., in the said shop then and there being found, then and there in the said shop feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It had been ruled that the indictment must allege expressly that the defendant stole the goods in the shop; and that an averment that they were in the shop, and that the defendant stole them, was not enough, Reg.* v. *Smith,* 2 *M. & Rob.* 115; *but this is overruled by Reg.* v. *Andrews, C. & Mar.* 121, (*ante, p.* 239).

*Felony, transportation for not more than fifteen nor less than ten years, or imprisonment not exceeding three years;* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 2; *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 195).

*Evidence.*

Prove that the defendant broke and entered the shop, &c. in question, in the same manner as upon an indictment for burglary, (*post, Sect. IV*), except that it is immaterial whether the breaking and entry be by night or day; if this proof fail, the defendant may be convicted of the simple larceny. Prove that the shop, &c. was at the time, &c., the shop of J. N., that is, that he occupied it, and carried on business there; then prove the larceny of the goods enumerated in the indictment, in the same manner as upon an indictment for housebreaking, (*ante, p.* 239), or stealing in the dwelling-house, (*ante, p.* 240). The value is immaterial. And lastly, prove that the shop, &c. is situate as described in the indictment.

Upon the repealed stat. 10 *&* 11 *W.* 3, *c.* 23, *s.* 1, it was holden that the goods stolen must have been the actual property of the owner of the shop, &c., *R.* v. *Stone,* 1 *Leach,* 334: *Anon.,* 2 *East, P. C.* 642, or, at least, such as were left with him for sale, *Ib.,* and were exposed, or were intended to be exposed, for sale. It was also holden that a warehouse, to be within the meaning of that statute, must have been such as factors or traders keep their goods for sale in, and where customers go to view them, and not such as are used for the safe keeping of goods merely. *R.* v. *Howard, Fost.* 77, 78: *see R.* v. *Godfrey,* 1 *Leach,* 287; but this distinction is now exploded; *see Reg.* v. *Hill,* 2 *M. & Rob.* 458. It has been holden also, upon the present statute, that a shop, to be within it, must be a shop for the sale of goods, and that a mere workshop (such as a carpenter's or blacksmith's shop) would not be sufficient. *Reg.* v. *Sanders,* 9 *C. & P.* 79: *but see Reg.* v. *Carter,* 1 *C. & K.* 173, *contrà.*

STEALING SILK, &c., IN THE PROCESS OF MANUFACTURE.

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### *Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 16]—Enacts, that if any person shall steal, to the value of ten shillings, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned. *Sect.* 14, (*ante, p.* 243).

7 *W.* 4 & 1 *Vict. c.* 90, *s.* 2]—*Recites* (*inter alia*) *the* 7 & 8 *G.* 4, *c.* 29, *s.* 16, *and enacts for this offence the same punishment as mentioned in the last precedent but one.* (*Ante, p.* 244).

### *Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, thirty yards of linen cloth, ("*any goods or articles of silk, woollen, linen, or cotton, or any one or more of these materials mixed with each other, or mixed with any other material*"), of the value of twenty shillings, ("*to the value of ten shillings*") of the goods and chattels of J. N., in a certain mill and building ("*building, field, or other place*"), of the said J. N., there situate, then and there being found, then and there in the said mill and building feloniously did steal, take, and carry away, whilst the same were laid, placed, and exposed in the said mill and building, during a certain stage, process, and progress of manufacture; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Other counts may be added, stating the particular process and progress of manufacture in which the goods were when stolen.*

*Felony, transportation for not more than fifteen nor less than ten years, or imprisonment for not more than three years;* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 2; *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 195).

*As to embezzlement of materials or tools by persons employed in such manufactures, see* 6 & 7 *Vict. c.* 40, *ss.* 2, 3, 11.

### *Evidence.*

Prove the larceny, as directed *ante, p.* 170, *et seq* except that an actual, and not merely a constructive taking must be proved; prove the value of the goods to be ten shillings at the least; then prove that the goods were stolen from the building, field, or other place described in the indictment, situate as described; and lastly, prove that, when stolen, the goods were placed, laid, or exposed in the building, &c. described, in a certain stage, process, or progress of manufacture.

Where, upon an indictment on the repealed statute 18 *G.* 2, *c.* 27, for stealing yarn from a bleaching-ground, it appeared in evidence

that the yarn, at the time it was stolen, was in heaps, for the purpose of being carried into the house, and not spread out for bleaching, *Thompson*, B., held that the case was not within the statute. *R.* v. *Hugill*, 2 *Russ.* 225. So, where the indictment was for stealing calico, placed to be printed and dried in a certain building, it was holden, that, in order to support the capital charge, it was necessary to prove that the building from which the calico was stolen was used either for drying or printing calico ; *R.* v. *Dixon, R. & R.* 53; but it should be observed, that the repealed statute mentioned particularly a building, &c., made use of by any calico-printer, &c. "for printing, whitening, booking, bleaching, or dyeing." Goods remain in a "stage, process, or progress of manufacture," within the meaning of the 7 & 8 *G.* 4, *c.* 30, *s.* 3, and therefore also within this statute, though the texture be complete, if they be not yet brought into a condition for sale. *R.* v. *Woodhead,* 1 *M. & Rob.* 549.

If you prove the larceny, but fail to prove the other circumstances, so as to bring the case within the statute, the defendant may be found guilty of the simple larceny only.



## STEALING FROM VESSELS OR DOCKS, &c.



### *Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 17]—Enacts, that if any person shall steal any goods or merchandize in any vessel, barge, or boat of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, or canal, or shall steal any goods or merchandize from any dock, wharf, or quay adjacent to any such port, river, canal, or creek, every such offender being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned. *Sect.* 14, (*ante, p.* 243).

7 *W.* 4 & 1 *Vict. c.* 90, *s.* 2]—*Recites* (*inter alia*) *the* 7 & 8 *G.* 4, *c.* 29, *s.* 17, *and enacts, for this offence, the same punishment as mentioned in the last precedent but two,* (*ante, p.* 244).



### *Indictment for stealing from a Vessel on a navigable River.*

*Commencement as ante, p.* 169]—in the county aforesaid, twenty pounds weight of indigo, ("*any goods or merchandize*"), of the value of fifty shillings, of the goods and merchandize of J. N., then and there being in a certain ship called the Rattler, ("*vessel, barge, or boat, of any description whatsoever*"), upon the navigable river Thames, ("*in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, canal, or creek*"), then and there being found,

then and there in the said ship feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

*Felony, transportation for not more than fifteen nor less than ten years, or imprisonment for not more than three years; 7 W. 4 & 1 Vict. c. 90, s. 2; with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s. 3, (ante, p. 195).*

*Evidence.*

Prove a larceny, as directed *ante, p.* 170 *et seq.*, except that you must prove an actual and not merely a constructive taking. The words "goods, wares, and merchandize," in the repealed stat. 24 *G.* 2, *c.* 45, were holden to extend to such goods, &c. only as are usually lodged in vessels, or on wharfs and quays. *R.* v. *Grimes, Fost.* 79, *n.*: *R.* v. *Leigh*, 1 *Leach*, 52. The same may be said of the present statute, by reason of the substitution of the words "goods and merchandize" for the words "chattel, money, or valuable security," which are used in other sections of the statute. The luggage of a passenger going by a steam-boat is within the statute. *R.* v. *Wright*, 7 *C. & P.* 159. Prove that the goods, &c. were at the time *in* the ship described in the indictment. The words of the statute are "*in* any vessel," &c.; and it is therefore immaterial whether the defendant succeeded in taking the goods from the ship or not, if there was a sufficient asportation in the ship to constitute larceny. A man cannot be guilty of this offence in his own ship. *R.* v. *Madox, R. & R.* 92. Lastly, prove that the ship was at the time upon the river, &c. mentioned in the indictment. This is matter of local description, and a variance in this respect between the statement and proof will be fatal. Where it was laid to be committed in a barge on the river Thames, and proved to have been committed in a barge lying aground on the bank of one of the creeks of the river, namely, Limehouse-dock, it was holden to be a fatal variance. *R.* v. *Pike*, 1 *Leach*, 417.

If you prove the larceny, but fail in proving the other circumstances requisite to bring the case within the statute, the defendant may be convicted of the simple larceny.

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*Indictment for stealing from a Dock, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, twenty pounds weight of indigo, ("*any goods or merchandize*") of the value of fifty shillings, of the goods and merchandize of J. N., in and upon a certain dock, ("*dock, wharf, or quay*"), adjacent to a certain navigable river called the Thames, ("*adjacent to any port, &c., see the last precedent*), then and there being found, then and there from the said dock feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony.* 7 & 8 *G.* 4, *c.* 29, *s.* 17. *See the last precedent.*

*Evidence.*

Prove the larceny, as directed *ante, p.* 170 *et seq.*, except that there must be an actual, and not merely a constructive taking. The goods must be such as are usually deposited upon docks, &c., for shipment, safe custody, or the like. Prove that the goods were taken *from* the dock, &c.; for which purpose a mere removal, such as would be sufficient to constitute simple larceny, will not suffice, for the words of the statute are, "from any dock," &c., to satisfy which there must be an actual removal from the dock, &c., in the same manner as upon an indictment for stealing from the person, (*post, p.* 261). Lastly, prove that the dock, &c., from which the goods were taken, is adjacent to the navigable river, &c. This, as we have seen in the last case, is a matter of local description, and must be proved strictly as laid.

If you prove the larceny, but fail in proving any of the other circumstances necessary to bring the case within the statute, the defendant may be convicted of the simple larceny.

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ROBBERY, &C.

*Statute.*

7 *W.* 4 & 1 *Vict. c.* 87, *s.* 2—*Robbery and Wounding*]—Enacts, that whoever shall rob any person, and at the time of, or immediately before, or immediately after such robbery, shall stab, cut, or wound such person, shall be guilty of felony, and being convicted thereof, shall suffer death.

4 *G.* 4, *c.* 48, *s.* 1—*Judgment of Death recorded.*]—Whereas it is expedient that in all cases of felony, not within the benefit of clergy, except murder, the court before which the offender or offenders shall be convicted shall be authorised to abstain from pronouncing judgment of death, whenever such court shall be of opinion that, under the particular circumstances of any case, the offender or offenders is or are a fit and proper subject, or fit and proper subjects, to be recommended for the royal mercy: be it therefore enacted, that from and after the passing of this act, whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer, then being present in court, to require and ask, whereupon such officer shall require and ask if such offender hath, or knoweth any thing to say why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorized to

abstain from pronouncing judgment of death upon such offender, and instead of pronouncing such judgment, to order the same to be entered on record, and thereupon such proper officer as aforesaid shall and may, and is hereby authorised to enter judgment of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender, by the court before which such offender shall have been convicted.

7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 3—*Robbery, &c., with Violence*]—Enacts, that whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person, or shall, together with one or more person or persons, rob or assault with intent to rob any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery, shall beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or be imprisoned for any term not exceeding three years.

Sect. 4—*Extorting Property by Threats*]—Enacts, that whosoever shall accuse or threaten to accuse any person of the abominable crime of buggery, committed either with mankind or beast, or of any assault with intent to commit the said abominable crime, or of any attempt or endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise, or threat to any person whereby to move or induce such person to commit or permit the said abominable crime, with a view or intent, in any of the cases aforesaid, to extort or gain from such person, and shall by intimidating such person by such accusation or threat extort or gain from such person any property, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sect. 5—*Robbery and Stealing from the Person*]—Enacts, that whosoever shall rob any person, or shall steal any property from the person of another, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.

Sect. 6—*Assaulting with intent to rob*]—Enacts, that whosoever shall assault any person with intent to rob, shall be guilty of felony, and being convicted thereof, shall (save and except in the cases where a greater punishment is provided by this act) be liable to be imprisoned for any term not exceeding three years.

Sect. 7—*Attempting to obtain Property by Menace*]—Enacts, that whosoever shall, with menaces or by force, demand any property of any person with intent to steal the same, shall be guilty of felony,

and being convicted thereof, shall be liable to be imprisoned for any term not exceeding three years.

Sect 10—*Place and Mode of Imprisonment*]—(*See ante, p.* 226).

Sect. 12—*Construction of the word "Property"*]—Enacts, that the the word "property" shall throughout this act be deemed to denote every thing included under the words "chattels, money, or valuable security," used in the 7 & 8 *G.* 4, *c.* 29. (*Ante, p.* 213).

7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11]—Enacts, that on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding: and when such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault, for any term not exceeding three years.

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*Indictment for robbery, attended with Stabbing, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, in and upon one J. N., in the peace of God and of our lady the Queen then and there being, feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then and there feloniously did put, and ten pieces of the current gold coin of the realm called sovereigns, of the value of ten pounds, and one gold watch of the value of five pounds, of the monies, goods, and chattels of the said J. N., from the person and against the will of the said J. N., feloniously and violently did steal, take, and carry away; and that the said J. S., immediately before he so robbed the said J. N. as aforesaid, ("*at the time of, or immediately before, or immediately after such robbery*"), the said J. N. in and upon the left side of him the said J. N. feloniously did stab, cut, and wound; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The particular place where the robbery was committed ought not to be stated, but if it be, and be stated incorrectly, it will be immaterial.* (*See ante, p.* 40).

*Felony, death;* 7 *W.* 4 & 1 *Vict. c.* 87, *s.* 2. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, *s.* 1, (*ante, p.* 251). *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Robbery, as defined by legal writers, consists in the felonious and forcible taking from the person of another, or in his presence against his will, of any "property," (*see suprà*), to any value, by violence, or putting him in fear. 4 *Bl. Com.* 243; 1 *Hawk. P. C.* 95. And in order to maintain this indictment, you must prove a larceny, and prove it to have been committed under the circumstances which, together with it, constitute the offence of robbery; and which we shall now consider under the following heads:—

*In bodily fear, &c.*]—The prosecutor must either prove that he was actually in bodily fear, from the defendant's actions, at the time of the robbery; or he must prove circumstances from which the court and jury may presume such a degree of apprehension of danger as would induce the prosecutor to part with his property; *Fost.* 128; and, in this latter case, if the circumstances thus proved be such as are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore, if a man knock another down, and steal from him his property whilst he is insensible on the ground, this is robbery. *Fost.* 128. A stage-coach having frequently been robbed on a particular road, J.N. went in it for the purpose of apprehending the robber; the robber met the coach, presented a pistol, and demanded money of the passengers; J. N. delivered his money, but immediately afterwards jumped out of the coach, and, with the assistance of others, secured the robber; and this was holden to be robbery. *Fost.* 129. Where the defendant tore a lady's ear through, in snatching an ear-ring from it, the judges held it to be robbery. *R.* v. *Lapier*, 1 *Leach*, 320. So, where the defendant tore some hair from a lady's head, in snatching a diamond pin from it, the pin having a corkscrew stalk, and being twisted very much in her hair; this was holden to be robbery. *R.* v. *Moore*, 1 *Leach*, 335. Where the defendant laid hold of the seals and chain of the prosecutor's watch, and pulled the watch out of his fob; but the watch being secured by a steel chain which went round the prosecutor's neck, the defendant could not take it, until by pulling and two or three jerks, he broke the chain, and then ran off with the watch; this was holden to be robbery. *R.* v. *Mason*, *R.* & *R.* 419. So, if there be a struggle for the property, and it be wrested from the prosecutor by superior force, it will be robbery: *R.* v. *Davis*, 2 *East*, *P. C.* 709. But merely snatching property from a person unawares, and running away with it, will not be robbery; *R.* v. *Steward*, 2 *East*, *P. C.* 702: *R.* v. *Horner*, *Id.* 703: *R.* v. *Baker*, 1 *Leach*, 290: *R.* v. *Robins*, *Id. n.*: *R.* v. *Macauley*, *Id.* 287, because fear cannot in fact be presumed in such a case. Where the prisoner caught hold of the prosecutor's watch-chain, and jerked his watch from his pocket with considerable force, upon which a scuffle ensued, and the prisoner was secured, *Garrow*, B., held that the force used to obtain the watch did not make the offence amount to robbery, nor did the force used afterwards in the scuffle; for the force necessary to constitute robbery must be either immediately before or at the time of the larceny, and not after it. *R.* v. *Gnosil*, 1 *C.* & *P.* 304. The rule, therefore, appears to be well established, that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery, unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it.

If a man take another's child, and threaten to destroy him unless the other give him money, this is robbery. *Per Eyre*, C. J., *in R.* v. *Reave*, 2 *East*, *P. C.* 735; *and see R.* v. *Donally*, *Id.* 718, So, where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given; the prosecutor thereupon gave him 5*s.*, but he insisted on more, and the prosecutor being terrified, gave him 5*s.* more; the defendant and the mob then took bread,

cheese, and cider from the prosecutor's house, without his permission, and departed; this was holden to be a robbery. *R.* v. *Simons*, 2 *East, P. C.* 731: *R.* v. *Brown, Ib.* So where, during some riots at Birmingham, the defendant threatened the prosecutor, that unless he would give him a certain sum of money, he should return with the mob and destroy his house, and the prosecutor, under the impression of this threat, gave him the money; this was holden by the judges to be robbery. *R.* v. *Astley*, 2 *East, P. C.* 729. So where, in the riots of 1780, a mob, headed by the defendant, came to the prosecutor's house and demanded half-a-crown, which the prosecutor, from terror of the mob, gave; this was holden to be robbery, although no threats were uttered. *R.* v. *Taplin*, 2 *East, P. C.* 712. Upon an indictment for robbery, it appeared that a mob came to the house of the prosecutor, and with the mob the prisoners, who advised the prosecutor to give them something to get rid of them and prevent mischief, by which means they obtained money from the prosecutor; and *Parke*, J., (after consulting *Vaughan*, B., and *Alderson*, J.), admitted evidence of the acts of the mob at other places before and after on the same day, to shew that the advice of the prisoners was not *bonâ fide*, but in reality a mere mode of robbing the prosecutor. *R.* v. *Winkworth*, 4 *C. & P.* 444.

Obtaining money under a threat of charging the prosecutor with an unnatural crime had, in many cases, been holden to be robbery; *R.* v. *Jones*, 1 *Leach*, 139; 2 *East, P. C.* 714: *R.* v. *Donally*, 1 *Leach*, 193; 2 *East, P. C.* 715: *R.* v. *Cannon, R. & R.* 146; even where it appeared that the prosecutor parted with his money from a fear merely of losing his character or situation by such an imputation. *R.* v. *Hickman*, 1 *Leach*, 278: *R.* v. *Egerton, R. & R.* 375: *see R.* v. *Elmstead*, 1 *Russ.* 894. But now, by stat. 7 *W.* 4 & 1 *Vict. c.* 87, *s.* 4, (*ante, p.* 252), "whosoever shall accuse or threaten to accuse any person of the abominable crime of buggery, committed either with mankind or with beast, or of any assault with intent to commit the said abominable crime, or of any attempt or endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise, or threat, to any person, whereby to move or induce such person to commit or permit the said abominable crime," *see R.* v. *Hickman*, 1 *Mood. C. C.* 34, with a view or intent to extort or gain from such person, and shall, by intimidating him by such accusation or threat, extort or gain from him any property, (*see ante, p.* 253), shall be guilty of felony, and punishable with transportation for life or not less than fifteen years, or imprisonment for not more than three years. Since this statute, an indictment in the ordinary form for robbery, cannot be supported by proof of extorting money &c. by threats of charging the crime of sodomy; but the indictment must be specially framed upon the statute; *Reg.* v. *Henry*, 2 *Mood. C. C.* 118; 9 *C. & P.* 309; *sed quære; see Reg.* v. *Stringer*, 2 *Mood. C. C.* 261; but where the property is parted with by threats to accuse other than those specified in the statute, the indictment may still be for robbery, if the party was put in fear, and parted with his property in consequence. *Reg.* v. *Norton*, 8 *C. & P.* 671. *See post, p.* 260, *for an indictment on this section.*

Where the prosecutrix was threatened by some persons at a mock auction to be sent to Bow-street, and from thence to Newgate, unless she paid for some article they pretended was knocked down to her,

although she never bid for it; and they accordingly called in a pretended constable, who told her that unless she gave him a shilling she must go with him; and she gave him a shilling accordingly, not from any apprehension of personal danger, but from a fear of being taken to prison: the judges held that the circumstances of the case were not sufficient to constitute the offence for robbery; it was nothing more than a simple duress. *R.* v. *Wood*, 2 *Leach*, 721; 2 *East*, *P. C.* 732. But where the defendant, with an intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her whilst thus handcuffed, put her into a hackney-coach for the purpose of carrying her to prison, and then took four shillings from her pocket for the purpose of paying the coach-hire; the jury finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held clearly that this was robbery. *R.* v. *Gascoigne*, 2 *East*, *P. C.* 709. Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she gave him some money to desist, which he put into his pocket, and then continued his attempt until he was interrupted; this was holden by the judges to be robbery. *R.* v. *Blackham*, 2 *East*, *P. C.* 711.

And it is of no importance under what pretence the robber obtains the money, &c., if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the court can presume it. As, for instance, if a man with a sword drawn ask alms of me, and I give it him through mistrust and apprehension of violence, it is as much a robbery as if he had demanded money in the ordinary way. 4 *Bl. Com.* 242. So, if thieves come to rob A., and finding little upon him, enforce him by menace to swear to bring them a greater sum, which he does accordingly, this is robbery, if, at the time he delivered the money, the fear of the menace continued to operate upon him. *Fitz. Cor. Pl.* 464; 1 *Hale*, 532. Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; after some altercation he went with the driver, under pretence of going before a magistrate, and during their absence the mob pillaged the cart; this was holden to be a robbery. *Merriman* v. *Hundred of Chippenham*, 2 *East*, *P. C.* 709. So, where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence of payment for them; this was holden to be robbery. *R.* v. *Simons*, 2 *East*, *P. C.* 712; *and see R.* v. *Spencer*, *Ib.*

The fear must precede the taking. For, if a man privately steal money from the person of another, and afterwards keep it by putting him in fear, this is no robbery, for the fear is subsequent to the taking. *R.* v. *Harman*, 1 *Hale*, 534; 1 *Hawk. c.* 34, *s.* 7: *see R.* v. *Gnosil*, 1 *C. & P.* 304, (*ante*, *p.* 254).

*One gold Watch, &c.*]—The property taken must be such as may be the subject of larceny, (*see ante*, *p.* 170); and must be proved to be the absolute or special property of the person named in the indictment. (*See ante*, *p.* 175). Where a servant who was sent by his master to receive money was robbed of the money on his return

home, *Alderson*, B., doubted whether it could be properly described as the money of the master, and discharged the jury, that another indictment might be preferred. *R.* v. *Rudick*, 8 *C.* & *P.* 237: (*see ante, p.* 176). The value is immaterial. 1 *Hale*, 532. But they must be of some value to the party robbed; and, therefore, where the defendant compelled the prosecutor, by threats, to sign a promissory note for a sum of money, it was holden by the judges not to be a robbery, because the note was of no value to the prosecutor. *R.* v. *Phipoe*, 2 *Leach*, 673; 2 *East, P. C.* 599: *and see R.* v. *Edwards*, 6 *C.* & *P.* 515, 521. In *R.* v. *Bingley*, 5 *C.* & *P.* 602, the prisoner attacked the prosecutor, and took from him a piece of paper, containing a memorandum of money that a person owed him, and *Gurney*, B., held it sufficient to constitute robbery.

*From the Person, &c.*]—The goods must be proved to have been taken either from the person of the prosecutor, or in his presence. *See R.* v. *Francis*, 2 *Str.* 1015: *R.* v. *Grey*, 2 *East, P. C.* 708: *R.* v. *Hamilton*, 8 *C.* & *P.* 49. If a thief put a man in fear, and then in his presence drive away his cattle, it is robbery. 1 *Hale*, 533. So, if a man be assaulted by a robber, throw his purse into a bush; or, flying from a robber, let fall his hat, and the robber, in his presence, take up the purse or hat and carry it away; this would be robbery. *Ib.* Upon an indictment for robbery, it appeared that the prosecutor was in company with another, who had the prosecutor's bundle, and who, upon the prosecutor being attacked with great violence by the prisoner, dropped down the bundle, and ran to the prosecutor's assistance, when one of the prisoners took up the bundle, and ran off with it. *Vaughan*, B., is reported to have held that this was not robbery, because the bundle was not in the prosecutor's possession at the time. *R.* v. *Fallows*, 5 *C.* & *P.* 501; *sed quære.*

*Against the Will.*]—It must appear in evidence that the goods were taken against the will of the party robbed; that is, that they were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery. Therefore, where the party robbed concerted and connived at the robbery, and got one of his confederates to procure two strangers to commit it, for the purpose of getting a reward upon the apprehension and conviction of the strangers, the judges held that it was not a robbery, because the property was not taken against the party's will. *R* v. *M'Daniel*, *Fost.* 121, 128.

*Feloniously.*]—The goods must appear to have been taken *animo furandi*, as in other cases of larceny. (*See ante, p.* 178). And therefore, if a man, by force or threats, compel another to give him goods he has to sell, and give him in return money to the amount of the value of the goods, it is very doubtful whether this be robbery; 1 *Hawk. P. C. c.* 34, *s.* 14; although undoubtedly it would be, if the goods were of greater value than the money given for them. (*See ante, p.* 178). If one, under a *bonâ fide* impression that the property is his own, obtain it by menaces, that is a trespass, but no robbery *R.* v. *Hall*, 3 *C.* & *P.* 409.

*Violently.*]—It is not necessary to prove that the goods were taken by actual violence or force; proof that they were delivered to the defendant by the party robbed, under the impression of that degree of fear and apprehension necessary to constitute robbery, will be sufficient. (*See ante, pp.* 253—256).

*Take and carry away.*]—An actual taking, either by force or upon delivery, must be proved; that is, it must appear that the robber actually got *possession* of the goods. Therefore, if a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up; this would not be robbery, because the purse was never in the possession of the robber. 1 *Hale*, 533. But it is immaterial whether the taking were be force or upon delivery; and if by delivery, it is also immaterial whether the robber have compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colourable pretence. (*See ante, pp.* 253—256.)

A carrying away must also be proved, as in other cases of larceny. (*See ante, p.* 191). And therefore, where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended; the judges held that the robbery was not complete. *R.* v *Farrell*, 1 *Leach*, 362, *n.* (*a*). But where the defendant snatched at a lady's ear-ring, and succeeding in separating it from the ear, and it was afterwards found among the curls of her hair; the court held this a sufficient proof of asportation to support the indictment. *R.* v. *Lapier*, 1 *Leach*, 320.

It may be necessary to add here, that if the property be once taken, the offence will not be purged by the robber's delivering it back to the owner. 1 *Hale*, 533; 1 *Hawk. c.* 34, *s.* 2; *R.* v. *Peat*, 1 *Leach*, 228; 2 *East*, *P. C.* 557.

*And that the said J. S. immediately before, &c., &c., did stab, &c.*]—Prove that the defendant, either immediately before, at the time of, or immediately after, the robbery, according to the allegation, stabbed, cut, or wounded the prosecutor, as the case may be. As to the nature of the evidence necessary to sustain the allegation of a stabbing, &c., (*see post, Chap. II, Sect. III.*) What period of time can be comprised within the words "immediately before," or "immediately after," will be a question for the court.

If the prosecutor should fail to prove the stabbing, &c., it would seem that the prisoner may be convicted of the robbery, and have sentence for the minor offence accordingly. And if he should fail to prove a robbery, but should prove an assault, the prisoner may be convicted of the assault only, and have sentence accordingly; *see* 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253); or, on an indictment against several, some may be found guilty of the felony, and others of the assault only. *Reg.* v. *Archer*, 2 *Mood. C. C.* 283; 1 *C. & K.* 174. This is retrospective, and applies to offences committed before the passing of the act. *Reg.* v. *Hagan*, 8 *C. & P.* 167. Where the prisoner was indicted for a robbery with violence, and the jury found him guilty of an assault, *but without any intention to commit any felony*, it was held that this special finding did not take the case out of the

operation of the statute, and that the prisoner might receive sentence of imprisonment with hard labour for the assault. *Reg.* v. *Ellis*, 8 *C. & P.* 654; *see Reg.* v. *Boden*, 1 *C. & K.* 395: *Reg.* v. *Pullen*, *cit. id.* 397. Where the indictment contained four counts, and the case was left to the jury on the last only, and the jury found the prisoner guilty of an assault, *Gurney*, B., held that the prisoner might receive judgment for the assault, although the last count was bad in arrest of judgment, if any one count were good. *Reg.* v. *Nicholls*, 9 *C. & P.* 269. Sentence of hard labour may be pronounced on all persons convicted of assaults under this section on indictments for felonies. *Anon.*, 2 *Mood. C. C.* 40; *Reg.* v. *W. Williams*, 8 *C. & P.* 286.

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### *Indictment for Robbery by a Person armed.*

*Commencement as ante, p.* 169]—in the county aforesaid, being then and there armed with a certain offensive weapon and instrument, to wit, a bludgeon, in and upon one J. N., in the peace of God and of our lady the Queen then and there being, feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then and there feloniously did put, and ten pieces of the current gold coin of the realm, called sovereigns, of the value of ten pounds, and one gold watch of the value of five pounds, of the monies, goods, and chattels of the said J. N., from the person and against the will of the said J. N., then and there feloniously and violently did steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life or not less than fifteen years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 3, *ante, p.* 252, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 10; (*ante, p.* 226). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

The evidence to support this indictment will be the same as in ordinary cases of robbery, (*see ante, p.* 253 *et seq.*), with the additional proof that the prisoner, at the time of the robbery, was armed with an offensive weapon or instrument. As to what will amount to an offensive weapon or instrument, see the cases referred to under the heads *Smuggling*, and *Offences relating to Game, post.* If the offence were committed by several persons, and one of them were armed, the others being present aiding and abetting, it would seem that that would be sufficient to convict them all of the whole charge in the indictment. *See R.* v. *Smith, R. & R.* 386. The defendant may be convicted of the robbery only, or of the assault only. (*See ante, p.* 258).

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### *Indictment for Robbery attended with Violence.*

*The same as in the last precedent but one, only substituting, instead of the allegation that the defendant stabbed, &c., the prosecutor, the fol-*

*lowing*:—and that the said J. S., immediately before he so robbed the said J. N. as aforesaid, ("*at the time of; or, immediately before, or, immediately after such robbery*"), him the said J. N. feloniously did strike and beat, ("*beat, strike, or use any other personal violence to any person*"). *An indictment for robbery, by two or more persons in company, will be the same as an indictment for robbing alone* [*see post, p.* 261], *except that it should charge that the defendants* together *robbed the prosecutor; if one of them only be apprehended, it will charge him by name,* "and a certain other person [*or,* certain other persons] to the jurors aforesaid unknown," &c.

*Felony; see the last precedent.* 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 3, (*ante, p.* 252). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove a robbery, as directed *ante, p.* 253 *et seq.*, and that the defendant, immediately before, at the time of, or immediately after the robbery, beat, struck, or used some other personal violence to the prosecutor. (*See ante, p.* 258). The defendant may be convicted of the robbery only, or of an assault only. (*Ib.*)

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*Indictment for obtaining Property by threatening to accuse of unnatural Practices.*

*Commencement as ante, p.* 169]—in the county aforesaid, feloniously did accuse one J. N. [*or,* did threaten one J. N. to accuse him the said J. N.] of having [*here describe the accusation or threat, so as to bring it within some of the words in the statute*], with the view and intent in so doing then and there and thereby to extort and gain from the said J. N. certain property of him the said J. N.; and that the said J. S., by then and there intimidating the said J. N. by the said accusation [*or,* threat] as aforesaid, did then and there feloniously extort and gain from the said J. N. ten pieces of the current gold coin of the realm, called sovereigns, of the value of ten pounds: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, see the last precedent but one.* 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 4, (*ante, p.* 252). *It has been held that, since this statute, the defendants cannot be indicted simply for robbery, but the indictment must be framed upon the statute. Reg.* v. *Henry,* 2 *Mood. C. C.* 118; 9 *C. & P.* 309; (*ante, p.* 255); *sed quære; see Reg.* v. *Stringer,* 2 *Mood. C. C.* 261. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant either accused or threatened to accuse the prosecutor of an unnatural crime, or of an assault with intent to commit it, or of an attempt or endeavour to commit it, or of making or offering some solicitation, persuasion, promise, or threat, to some person to commit or permit it: that the view and intent of the defendant was to extort some property (*see ante, p.* 253) from the prosecutor, and that property was extorted or gained from him by the influence of the accusation or threat. The intent may be proved from the ex-

pressions used by the defendant, or inferred from the circumstances. Where, before the passing of this statute, a threat of this kind was made for the purpose of extorting money from the prosecutor, and the prosecutor some time afterwards gave the defendant the money demanded, not from any apprehension of injury to his character, but to have an opportunity of prosecuting the defendant for the offence; the judges held that it was not a robbery, because there was no actual fear, nor any violence from which they could imply or presume it. *R.* v. *Reane*, 2 *Leach*, 616; *and see R.* v. *Jackson et al.*, 1 *East, P. C.*, *Addenda*, xxi: *R.* v. *Fuller*, *R.* & *R.* 408; 1 *Russ.* 890. So, the intimidation must be on the mind of the person threatened to be accused; and therefore it was held not to be a robbery to obtain money from a woman under a threat of accusing her husband. *R.* v. *Edward*, 1 *M.* & *Rob.* 257. It is immaterial whether the prosecutor be guilty or innocent of the offence imputed to him. *R.* v. *Gardner*, 1 *C.* & *P.* 479. On the trial of an indictment under this section, the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner when he was taken into custody. *Reg.* v. *Kain*, 8 *C.* & *P.* 187. The threatening to accuse need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient. *R.* v. *Robinson*, 2 *M.* & *Rob.* 14.

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### *Indictment for Robbery.*

*Commencement as ante, p.* 169]—in the county aforesaid, in and upon one J. N., in the peace of God and of our lady the Queen then and there being, feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then and there feloniously did put, and ten pieces of the current gold coin of the realm, called sovereigns, of the value of ten pounds, of the monies, goods, and chattels of the said J. N., from the person and against the will of the said J. N., then and there feloniously and violently did steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The indictment may charge the defendant with having assaulted several persons, and stolen different sums from each, if the whole was one transaction. Reg.* v. *Giddins, C.* & *Mar.* 634.

*Felony, transportation for not more than fifteen years nor less than ten years, or imprisonment not exceeding three years,* 7 *W.* 4 & 1 *Vict. c.* 87, *s.* 5, (*ante, p.* 252), *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 10, (*ante, p.* 226).

*For the evidence to support this indictment, see ante, p.* 253 *et seq.*

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### *Indictment for stealing from the Person.*

*Commencement as ante, p.* 169]—in the county aforesaid, one watch, of the value of five pounds, one pocket-book, of the value of two shillings, and one pocket-handkerchief, of the value of one shilling, ("*any property*") of the goods and chattels of J. N., from the person

of the said J. N., then and there feloniously did take, steal, and carry away: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony*, 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 5. *See the last precedent.*

## *Evidence.*

Prove a larceny, as directed *ante*, *p.* 170 *et seq.*, except that an actual, and not merely a constructive taking, must be proved; and prove the goods to have been actually severed from the person of J. N. Where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket; this was holden, by a majority of the judges, not to be a sufficient asportation to warrant a conviction for stealing from the person, because, from the first to the last, the book remained about the person of the prosecutor; although it was sufficient to constitute a simple larceny. *R.* v. *Thompson*, 1 *Mood. C. C.* 78. Where a man went to bed with a prostitute, having left his watch in his hat on the table, and while he was asleep she stole the watch, this was held to be stealing in the dwelling-house, and not a stealing from the person. *R.* v. *Hamilton*, 8 *C. & P.* 49.

It is immaterial whether the larceny were effected by stealth or with force. If with force sufficient to constitute robbery, the defendant ought to be indicted for that offence; but if it appear, upon an indictment for stealing from the person, that the force used was sufficient to constitute a robbery, the defendant will not, upon that ground, be entitled to an acquittal. *R.* v. *Pearce*, *R. & R.* 174; 2 *Leach*, 1049: *R.* v. *Robinson*, *R. & R.* 321.

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## *Indictment for an Assault with intent to rob.*

*Commencement as ante, p.* 169]—in the county aforesaid, with force and arms, in and upon one J. N., in the peace of God and of our lady the Queen then and there being, feloniously did make an assault, with intent the monies, goods, and chattels of the said J. N., from the person and against the will of him the said J. N., then and there feloniously and violently to steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *This form of indictment was held good in Reg.* v. *Huxley*, *C. & Mar.* 596; *it need not in terms charge an intent to* rob *the prosecutor.*

*This count cannot be added to a count for robbery; if it be, the prosecutor will be put to his election. R.* v. *Gough*, *Moo. & M.* 71.

*Felony, imprisonment not exceding three years*, 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 6, (*ante*, *p.* 252), *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 10, (*ante*, *p.* 226).

*Indictments for an assault with intent to rob, the prisoner being armed, or for an assault with intent to rob, together with one or more person or persons, may easily be framed by comparing this with the pre-*

*cedents for robbery under the same circumstances.* (*See ante, pp.* 253, 259). *The punishment is the same as for such robbery.* 7 *W.* 4 & 1 *Vict. c.* 87, *s.* 3, (*ante, p.* 252).

### *Evidence.*

To support this indictment, you must prove the assault and the intent.

In proof of the former, it is not necessary to shew that the defendant committed actual violence upon J. N.: for an assault is an attempt to commit a forcible crime upon another: and therefore, if the defendant, intending to rob J. N., did anything in his presence, with reference to him, in furtherance of that intent, it will be sufficient. The evidence upon this indictment usually proves a robbery, with the exception of the taking and carrying away. In *R.* v. *Thomas*, 1 *Leach*, 330; 1 *East, P. C.* 417, it was holden, that an indictment, which alleged the assault to be have been made upon J. N., was not supported by proof that the assault was made upon the driver of the post-chaise in which J. N. was: but this indictment was framed upon the repealed statute, 7 G. 3, *c.* 21, which made it felony for any person with an offensive weapon to assault any other person, with intent to rob *such person;* and the more general words of the present statute would probably be satisfied by an indictment charging an assault upon A., with an intent to rob B.

The intent to rob must, of course, be proved from circumstances. It is a question entirely for the jury to determine, and which they will, in general, have to presume from the circumstances attending the assault, the time and place in which it was committed, the expressions or gestures of the defendant at the time, and the like. No actual demand of money, &c., is necessary to support this indictment. *R.* v. *Trusty*, 1 *East, P. C.* 448: *R.* v. *Sherwin, Id.* 421. Assaulting and threatening to charge with an infamous crime, with intent thereby to extort money, is an assault with intent to rob, under this statute. *Reg.* v. *Stringer*, 2 *Mood, C. C.* 260; 1 *C. & K.* 188.

Where the defendant decoyed the prosecutor into a house, and chained him down to a seat, and there compelled him to write orders for the payment of money and for the delivery of deeds, and the paper on which he wrote remained in his hands half an hour, but he was chained all the time, this was held not to be an assault with intent to rob. *R.* v. *Edwards*, 6 *C. & P.* 521: *see R.* v. *Phipoe*, 2 *Leach*, 673.

The prisoner may be convicted of the assault only. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253).

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### *Indictment for demanding Property with Menaces or by Force, with intent to steal the same.*

*Commencement as ante, p.* 169]—in the county aforesaid, with menaces, [*or*, " by force," *or*, "with menaces and force"], did feloniously demand of J. N. the money ("*any property*"), of him the said J. N., with intent the said money from the said J. N. then and there feloniously to steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*The chattel, money, or valuable security demanded must be stated according to the fact. If the demand were of a specific chattel, or valuable security, it may be stated thus:* "a certain chattel, to wit, ——," *or,* "a certain valuable security to wit, —— ." *Where an indictment stated, that the defendant* "feloniously, by menaces, did demand the monies of the said J. N.," *it was holden to be insufficient, because it did not state from whom he had demanded them. R.* v. *Dunkley,* 1 *Mood. C. C.* 90.

*Felony, imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.*87, *s.*7, (*ante, p.*252), *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 10, (*ante, p.* 226).

*Evidence.*

To support this indictment, the prosecutor must prove a demand by the defendant of the money or other thing stated in the indictment, "by menaces or force," with intent to steal it. It is not necessary to prove an express demand in words; the statute says, "if any person shall, with menaces or by force, demand," &c.; and menaces are of two kinds—by words, or by gestures: so that, if the words or gestures of the defendant at the time were plainly indicative of what he required, and tantamount in fact to a demand, it should seem to be sufficient proof of the allegation of demand in the indictment. *See R.* v. *Jackson,* 1 *Leach,* 269.

If a person, with menaces, demand money of another, who does not give it him because he has it not with him, this is a felony within the statute: but if the party demanding the money knows that it is not then in the prosecutor's possession, and only intends to obtain an order for the payment of it, it is otherwise. *R.* v. *Edwards,* 6 *C. & P.* 515.

The intent to steal, must, of course, be presumed from circumstances. It is a question entirely for the jury to determine, and which they will, in general, have to presume from the circumstances attending the demand, the expressions or gestures of the prisoner when he made it, and the like.

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## PIRACY AT COMMON LAW.

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*Indictment.*

Yorkshire, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of Hull, in the county of York, mariner, K. S., late of the same place, mariner, and L. T., late of the same place, mariner, on the third day of August, in the year of our Lord one thousand eight hundred and forty-five, with force and arms, upon the high seas, to wit, in and on board of a certain ship, called the Windsor Castle, in a certain place upon the high seas, distant about ten leagues from Cutcheen in the East Indies, then being, in and upon certain mariners, (to the jurors aforesaid unknown), in the peace of God and of our lady the Queen then and there being, piratically and feloniously did make an assault, and them the said

mariners in bodily fear and danger of their lives, on the high sea aforesaid, then and there piratically and feloniously did put, and the said ship called the Windsor Castle, and the apparel and tackle of the said ship, of the value of twelve hundred pounds, and seventy chests of opium, of the value of fourteen hundred pounds, in and on board the said ship then being, of the goods and chattels of certain subjects of our said lady the Queen, to the jurors aforesaid unknown, and then and there in the custody and possession of the said mariners last aforesaid, with force and arms, from the care, custody, and possession, and against the will of the said mariners last aforesaid, then and there, to wit, on the day and year last aforesaid, upon the high sea aforesaid, in the place aforesaid, and within the jurisdiction aforesaid, piratically, feloniously, and violently did steal, take, and carry away, against the peace of our lady the Queen, her crown and dignity. *As to the venue and place of trial, see ante, p. 21.*

*By 28 H. 8, c. 15, ss. 2, 3, piracy at common law,* i. e. *robbery on the high seas, was made punishable with death, and with loss of lands and goods, in the same manner as upon an attainder for robbery on land. The 39 G. 3, c. 37, s. 1, however, made offences committed within the jurisdiction of the Admiralty punishable in the same manner as if they had been committed on land. The 1 G. 4, c. 90, s. 1, extended to such offences the benefit of clergy, as if committed on land; and the stat. 7 & 8 G. 4, c. 28, s. 12, enacted, that "all offences prosecuted in the High Court of Admiralty of England should, upon every first and subsequent conviction, be subject to the same punishment, whether of death or otherwise, as if such offences had been committed upon the land." See now 7 W. 4 & 1 Vict. c. 88, (post, p. 267).*

### *Evidence.*

Prove a robbery, and prove it to have been committed upon the high seas, within the jurisdiction of the Admiralty. Attend also to the following particulars of evidence :—

*Upon the high Seas.*]—The offence must be proved to have been committed within the jurisdiction of the Court of Admiralty; that is, upon some part of the sea which is not *infra corpus comitatûs. See* 13 *R.* 2, *st.* 1, *c.* 5; 15 *R.* 2, *c.* 3. All rivers in this country, until they flow past the furthest point of land next the sea, are within the jurisdiction of the courts of common law, and not of the Court of Admiralty. *See* 1 *Rep.* 175; 3 *Inst.* 113; 3 *T. R.* 315. Nor does the admiralty jurisdiction extend to any haven, creek, arm of the sea, or other place within the body of a county; 3 *Inst.* 113; 1 *Hawk. c.* 37, *s.* 11; thus, where the sea flows in between two points of land in this country, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within that line; the Court of Admiralty of all offences without it. *But see R.* v. *Bruce, R. & R.* 242. But if a robbery be committed in creeks, harbours, ports, &c., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy. *R.* v. *Jemot, Old Bailey,* 28*th Feb.,* 1812, *MS.* On an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; but

the judges held that the Admiralty had jurisdiction, it being a place where great ships go. *R.* v. *Allen*, 1 *Mood. C. C.* 494. As to offences committed on the coasts, the Admiralty have exclusive jurisdiction of offences committed beyond the low-water mark; and, between that and the high-water mark, the Court of Admiralty has jurisdiction of offences done upon the water when the tide is in; and the courts of common law of offences committed upon the strand when the tide is out. All the other parts of the high sea are indisputably within the jurisdiction of the Admiralty.

*In and on Board, &c.*]—This must be proved as laid. If the name of the ship be unknown, it must be stated so in the indictment. (*See ante, p.* 35).

*In the Peace of our Lady the Queen.*]—Some evidence must be given of this; for if the persons robbed be subjects of a state at enmity with this country, although it may perhaps be piracy, yet it is not cognizable as such in any court of Admiralty within this realm. 4 *Inst.* 154; 2 *R.* 3, *f.* 2. *See R.* v. *Sawyer, R. & R.* 294.

*In bodily Fear, &c.*]—This must be proved in the same manner as in robbery. 1 *Sir L. Jenk.* xciv.

*And the said Ship, &c.*]—The things stolen are proved in the same manner as in ordinary cases of larceny. The value is immaterial, as in a robbery upon land. *Molloy*, 64, *s.* 18; *Beawes*, 231. It is said, that if one or more of the crew or passengers in a vessel be taken for the purpose of being sold as slaves, it is piracy. *Molloy*, 63, *s.* 16; *and see* 5 *G.* 4, *c.* 113.

*Of the Goods and Chattels of, &c.*]—These must be stated to be the goods of a subject or subjects of this realm, or of some state in amity with it; and the allegation must be proved as laid. (*See ante, p.* 265).

*Piratically, feloniously, and violently.*]—The goods must be proved to have been taken *animo furandi*, as in other cases of larceny. *Molloy*, 71, *s.* 33. (*See ante, p.* 178.) And they must be proved to have been either taken with force and violence, or delivered to the pirates under the impression of that degree of fear and apprehension which is necessary to constitute robbery upon land. (*See ante, p.* 253).

The taking, to be piracy, must be without authority from any prince or state. If a party making a capture at sea do so by the authority of any prince or state, it cannot be considered piracy; for a nation never can be deemed pirates; fixed domain, public revenue, and a certain form of government, exempt a people from that character. Even a capture by authority of the states of Algiers, Tunis, or Tripoli, cannot be treated as piracy. 2 *Sir L. Jenk.* 790; *Grot.* 2, *c.* 18, *s.* 2. Also, at common law, if a subject of this realm committed acts of hostility against another subject, under the authority of a commission from a foreign prince, it was not piracy; 2 *Sir L. Jenk.* 754; but the law has been altered in this respect by 11 & 12 *W.* 3, *c.* 7, *and* 18 *G.* 2, *c.* 30, *s.* 1. *See R.* v. *Evans*, 2 *East, P. C.* 798.

If the subjects of the same state commit robbery upon each other, upon the high sea, it is piracy. If the subjects of different states commit robbery upon each other, upon the high sea, if their respective states be in amity, it is piracy; if at enmity, it is not; for it is a general rule, that enemies never can commit piracy on each other, their depredations being deemed mere acts of hostility. 1 *Sir L. Jenk.* xciv: 4 *Inst.* 154.

But if a commissioned ship, by mistake, capture a vessel belonging to the subjects of a friendly power, imagining it to belong to an enemy, and bring it, without damage, into port, for condemnation, this is not piracy. *See* 1 *Sir L. Jenk.* xciv.

*Steal, take, and carry away.*]—This is proved in the same manner as in robbery. *Molloy*, 64, *s.* 18. If persons at sea force the captain of a vessel to sell part of his cargo for less than its value, it is piracy. 3 *T. R.* 713. *See* 28 *H.* 8, *c.* 15, *s.* 4. But if a pirate attack a vessel, and, before he obtains possession of her, the captain, in order to redeem her, give an oath to pay a sum certain, this is no piracy, for there was no taking. *Molloy*, 64, *s.* 18. But if there be an actual taking, it is piracy, although the pirate afterwards allow the party to proceed on his voyage. 1 *Sir L. Jenk.* xcviii.

PIRACY BY STATUTE.

*Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 1]—*Repeals so much of the stats.* 28 *H.* 3, *c.* 15; 11 *&* 12 *W.* 3, *c.* 7; 4 *G.* 1, *c.* 11; 8 *G.* 1, *c.* 24; *and* 18 *G.* 2, *c.* 30, *as relates to the punishment of the crime of piracy, or of any offence by any of the said acts declared to be piracy, or of accessaries thereto respectively.*

Sect. 2—*Piracy attended with violence*]—Enacts, that whosoever, with intent to commit, or at the time of, or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act whereby the life of such person may be endangered, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

Sect. 3—*Punishment of Piracy*]—Enacts, that whosoever shall be convicted of any offence, which, by any of the acts hereinbefore referred to, amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not exceeding fifteen years, or to be imprisoned for any term not exceeding three years.

Sect. 5—*Place and Mode of Imprisonment*]—Enacts, that where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the

court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

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### *Indictment for Piracy attended with Violence.*

*This indictment may easily be framed from the precedent of an indictment for piracy at common law,* (*ante, p.* 264), *by adding an allegation,* "that the defendant then and there, with intent to commit [*or,* "at the time of," *or,* "immediately before," *or,* "immediately after the committing"] such piracy as aforesaid, in and upon one J. N., then and there being on board of [*or,* "belonging to"] the said ship, feloniously did make an assault, with intent him the said J. N. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder;" [*or otherwise, as the case may be*]; *and concluding against the form of the statute. The evidence will be the same as stated ante, p.* 265, *with the addition of the proof necessary to sustain the above allegation.*

*Felony, death.* 7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 2. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, *s.* 1, (*ante, p.* 251). *The offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*As to offences made piracy by previous statutes, see ante, p.* 21. *As to piracy by dealing in slaves, and the offence of fitting out vessels, &c. for the slave-trade, &c., see* 5 *G.* 4, *c.* 113, *and Reg.* v. *Zulueta,* 1 *C. & K.* 215.

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## RECEIVING STOLEN GOODS.

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### *Statute.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 54—*Receivers may be tried as Accessaries after the Fact, or for substantive Felony*]—With regard to receivers of stolen property, enacts, that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted, either as an accessary after the fact or for a substantive felony, and, in the latter case, whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment: provided al-

ways, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.

Sect. 55—*Receivers, where original Offence Misdemeanor*]—Enacts, that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall, on conviction, be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

Sect. 56—*Venue in Indictment against Receivers*]—Enacts, that if any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, or converted, every such person, whether charged as an accessary after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried, and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property.

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*Indictment against a Receiver of stolen Goods, as for a substantive Felony.*

*Commencement as ante, p.* 169]—in the county aforesaid, one silver tankard, ("*chattel, money, or valuable security,* (*see* 7 *&* 8 *G.* 4, *c.* 26, *s.* 5, *ante, p.* 213), *or other property whatsoever*"), of the value of two pounds, of the goods and chattels of one J. N., before then feloniously stolen, taken, and carried away, feloniously did receive and have, (he the said J. S. then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away), against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It is not necessary to state by whom the principal felony was committed; R.* v. *Jervis,* 6 *C. & P.* 166; *and, if stated, it is not necessary to aver that the principal has not been convicted. R.* v. *Baxter,* 5 *T. R.* 83.

*If it be alleged in the indictment that the principal felony was committed by A. B., it must be proved that A. B. committed the felony, otherwise the receiver must be acquitted. R.* v. *Woolford,* 1 *M. & Rob.* 384. *If, however, the indictment state the larceny to have been committed by some persons to the jurors unknown, it is no objection that the grand*

*jury at the same assizes find a bill for the principal felony against J. S. R.* v. *Bush, R. & R.* 272. *An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that C. D. and E. F. feloniously received the said goods, knowing them to be stolen, was holden good against the receivers, as for a substantive felony. R.* v. *Caspar,* 2 *Mood. C. C.* 101; 9 *C. & P.* 289. *As to the venue, see ante, p.* 26.

*Felony, transportation for not more than fourteen nor less than seven years, or imprisonment not exceeding three years, with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169), *such confinement not exceeding one month at any one time, nor three months in any one year;* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169); *and, if a male, to be once, twice, or thrice publicly or privately whipped in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 54, (*ante, p.* 268). *See* 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 6, *and c.* 87, *s.* 9.

*The statute extends to "chattels, money, valuable securities,* (*see ante, p.* 213), *and other property whatsoever," and the receiver may be indicted and convicted as an accessary after the fact, or for a substantive felony, whether the principal be or be not convicted, or be or be not amenable to justice.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 54, (*ante, p.* 268). *Buying or receiving goods stolen from a ship or vessel on the river Thames, knowing the same to be stolen, is punishable with transportation for fifteen years.* 2 *G.* 3, *c.* 28, *s.* 12. *See R.* v. *Wyer,* 2 *T. R.* 77; 1 *Chit. Burn.* 35. *Buying or receiving anchors, goods, &c., weighed up, is a misdemeanor, punishable as such, or by transportation for seven years.* 1 *&* 2 *G.* 4, *c.* 75, *s.* 11; 1 *&* 2 *G.* 4, *c.* 76.

*It may be useful to mention in this place, that the owner prosecuting the receiver or thief to conviction, is entitled to restitution of his property, except in the case of a valuable security bonâ fide paid or transferred, if a negotiable security, for a valuable consideration.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 57, (*post*). *As to the purchasing or receiving of materials or tools embezzled by persons employed in the woollen, worsted, linen, cotton, flax, mohair, or silk manufactures, see* 6 *&* 7 *Vict. c.* 40, *ss.* 4, 5, 11.

### *Evidence.*

Prove a larceny of the goods mentioned in the indictment, as directed, *ante, p.* 170 *et seq.*, for which purpose the principal felon is a competent witness, and indeed to prove the whole case. *R.* v. *Haslem,* 1 *Leach,* 418. But the confession of the principal is not admissible evidence against the receiver for any purpose. *R.* v. *Turner,* 1 *Mood. C. C.* 347. It is competent to the defendant to disprove the guilt of the principal. *Fost.* 365.

Having proved the larceny, you must prove the goods stolen to have been received by the defendant; and if two defendants be indicted jointly for receiving, a joint act of receiving must be proved in order to convict both. *R.* v. *Messingham,* 1 *Mood.* 257. *See R.* v. *Archer, ante, p.* 16. Where A., knowing that goods had been stolen, directed B., his servant, to receive them into his premises, and B., in pursuance of that direction, afterwards received them in A.'s absence, B. also knowing that they had been stolen, they were held to be indictable jointly. *Reg.* v. *Parr,* 2 *M. & Rob.* 346. Proof that the goods were found in the defendant's possession is good presumptive evidence of the fact; or it may be proved by the principal

felon. If it be proved that the defendant not only received the articles, but also assisted in stealing them, he may still be convicted, provided some other person assisted in the theft; because the stealing and receiving are both felonies, and a theft by several is a theft by each. *See R.* v. *Dyer*, 2 *East, P. C.* 767: *R.* v. *Attwell, Id.* 768; (*ante, p.* 4). Where three persons were charged with larceny, and two others as accessaries, in separately receiving portions of the stolen goods; and the indictment contained also two other counts, each of them charging one of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods, it was ruled that, though the principals were acquitted, the receivers might be convicted on the last two counts of the indictment. *Reg.* v. *Pulham*, 9 *C. & P.* 280. *See Reg.* v. *Hayes*, 2 *M. & Rob.* 156.

And, lastly, it must be proved that the defendant, at the time he received or bought the goods, knew them to be stolen. This is proved, either directly, by the evidence of the principal felon, or circumstantially, by proving that the defendant bought them very much under their value, 1 *Hale*, 619, or denied their being in his possession or the like. And, to shew a guilty knowledge, other instances of receiving may be proved; *R.* v. *Dunn*, 1 *Mood. C. C.* 146; even though they be the subject of other indictments and antecedent to the receiving in question. *R.* v. *Davis*, 6 *C. & P.* 177. A boy stole a chattel from his master, and after it had been taken from him in his master's presence, it was, with the master's consent, restored to him again, in order that he might sell it to the defendant, to whom he had been in the habit of selling similar stolen articles. He accordingly sold it to the defendant, who, being indicted for feloniously receiving it of an evil-disposed person, knowing it to be stolen, was convicted, and, notwithstanding objection made, sentenced. *Reg.* v. *Lyons*, 1 *C. & Mar.* 217.

A. and B. were indicted, the one for stealing and the other for receiving six notes of 100*l.* each. A. stole the notes, changed them into notes of 20*l.* each, some of which he gave to B.; and it was holden that B. could not be convicted, for he did not receive the notes that were stolen. *R.* v. *Walkeley*, 4 *C. & P.* 132.

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### *Indictment against a Receiver, where the principal Offence is a Misdemeanor.*

*Commencement as ante, p.* 169]—in the county aforesaid, one silver tankard of the value of six pounds, ("*any chattel, money, valuable security, or other property whatsoever*"), of the goods and chattels of J. N., then lately before unlawfully, knowingly, and designedly obtained ("*stolen, taken, obtained, or converted*") from the said J. N., by false pretences, unlawfully did receive and have, he the said J. S. then and there well knowing the said goods and chattels to have been unlawfully, knowingly, and designedly obtained from the said J. N. by false pretences; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The indictment must allege the goods to have been obtained by false pretences, and known to have been so; it is not enough to allege them to have been "unlawfully obtained, taken, and carried away." Reg.* v. *Wilson*, 2 *Mood. C. C.* 52. *The venue may be laid as in the last case.*

*Misdemeanor, transportation for seven years, or imprisonment, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 29, s. 4, (ante, p. 169), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169)), not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit, 7 & 8 G. 4, c. 29, s. 55, (ante, p. 268).*

*The statute extends to "chattels, money, valuable securities, (see ante, p. 215), and other property whatsoever," the stealing &c. whereof is a misdemeanor, and the receiver may be indicted and convicted, whether the principal shall or shall not have been previously convicted, or shall or shall not be amenable to justice. 7 & 8 G. 4, c. 29, s. 55, (ante, p. 268).*

*Evidence.*

Prove the principal offence, and the receipt and guilty knowledge of the defendant, as in the last case.

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*Indictment against the Principal and Receiver jointly.*

*After the conclusion of the indictment against the principal, continue it in the same paragraph thus:*]—and the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish aforesaid, in the county aforesaid, labourer, afterwards to wit, on the fourth day of August, in the year last aforesaid,* at the parish aforesaid, in the county aforesaid, the goods and chattels aforesaid, ("*chattels, money, valuable security, or other goods, whatsoever*"), of the value aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, he the said J. S., then and there well knowing the said goods and chattels last aforesaid to have been feloniously stolen, taken, and carried away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Receivers, where the stealing is felony by common law or by stat. 7 & 8 G. 4, c. 29, may be indicted as accessaries after the fact, and are punishable with transportation for not more than fourteen nor less than seven years, or imprisonment not exceeding three years, with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 29, s. 4, (ante, p. 169), such confinement not exceeding one month at any one time, nor three months in any one year; 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169); and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 G. 4, c. 29. s. 54, (ante, p. 268).*

*Evidence.*

Prove the larceny, as directed *ante, p.* 170 *et seq.*, and prove the offence against the receiver, as directed under the last precedent but one.

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*Indictment against the Receiver as Accessary, the Principal being convicted.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit ["at the general sessions of the

delivery of the gaol of" &c. &c.—*so continuing the caption of the former indictment*—" it was presented, that one J. T., late of," *&c., continuing the indictment to the end; reciting it, however, in the past and not in the present tense*]: upon which said indictment the said J. T., at the session of gaol delivery aforesaid, was duly convicted of the felony and larceny aforesaid; as by the record thereof more fully and at large appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish aforesaid, in the county aforesaid, labourer, after the committing of the said larceny and felony as aforesaid, to wit, on the third day of August, in the year last aforesaid, [*&c. as in the last precedent, from the**].

### *Evidence.*

Give in evidence an examined copy of the record of the conviction of the principal, as proof of his conviction, and of the commission of the larceny. An examined copy will be sufficient; because the statement of the indictment and conviction of the principal is matter of inducement merely. (*See ante, p.* 125). It is not necessary that it should appear from the record that the principal was attainted; if it appear that he was convicted, it is sufficient. *R.* v. *Baldwin*, 3 *Camp.* 265: *R.* v. *Hyman*, 2 *East, P. C.* 782; 7 *G.* 4, *c.* 64, *s.* 11. And although the record be erroneous, it is good evidence against the accessary, until reversed. *R.* v. *Baldwin*, 3 *Camp.* 265; *R. & R.* 241.

After thus proving the larceny and conviction, prove the offence of receiving the stolen property, as directed *ante, p.* 270.

If the goods stolen have been altered between the time of the larceny and that of the receipt, so as to pass under a new denomination, the indictment should correspond with the fact. And where the principal was indicted for sheep stealing, and the accessary charged with receiving "twenty pounds of mutton, parcel of the goods," &c., it was holden good. *R.* v. *Cowell*, 2 *East, P. C.* 617, 781.

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## RECEIVING STOLEN LETTERS, &c.

### *Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 30]—Enacts, that every person who shall receive any post letter or post letter bag, or any chattel or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof, shall amount to a felony under the Post-Office Acts, (*see ante, p.* 217), knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post, shall be guilty of felony, and may be indicted and convicted either as an accessary after the fact, or for a substantive felony, and, in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, however convicted, shall be liable to be transported beyond the seas for life. *See* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 41, (*ante, p.* 219).

*Indictment against a Receiver of stolen Letters, &c., as for a substantive Felony.*

*Commencement as ante, p.* 169]—in the county aforesaid, one post letter, ("*any post letter or post letter bag, or any chattel or money, or valuable security,*" *&c.*), the property of the postmaster-general, before then from and out of a certain post letter bag feloniously stolen, taken, and carried away, [*as the case may be, (see ante, p.* 221)], ("*stolen, taken, embezzled, and secreted*"), feloniously did receive and have, he the said J. S. then and there well knowing the same post letter to have been feloniously stolen, taken, and carried away from and out of the said post letter bag as aforesaid, and to have been sent ("*sent or intended to be sent*") by the post; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 19. *The property may be laid in the postmaster-general, and it is not necessary to allege or prove any value.* (*See ante, p.* 219).

*Felony, transportation for life,* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 30, *or for not less than seven years, or imprisonment not exceeding three years, Id. s.* 41, (*ante, p.* 219), *with or without hard labour and with or without solitary confinement, Id. s.* 42, (*ante, p.* 219), *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*Evidence.*

Prove the felony, as directed *ante, p.* 225; then prove the receipt and guilty knowledge, as directed *ante, p.* 273; and also prove that the defendant, at the time he received the letter, &c., knew that it had been sent, or that it was intended to have been sent, by the post. This may be shewn by the post-mark on the letter, or by the contents of the letter, if brought to the defendant's knowledge, or by other circumstances from which it may be inferred. (*See ante, p.* 102).

SECT. 2.

EMBEZZLEMENT.

BY CLERKS OR SERVANTS.

*Statutes.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 47]—For the punishment of embezzlements committed by clerks and servants, declares and enacts, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from

his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed: and every such offender, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned. (Sect. 46, *ante, p.* 193).

Sect. 48—*Form of Indictment*]—For preventing the difficulties that have been experienced in the prosecution of the last-mentioned offenders, enacts, that it shall be lawful to charge in the indictment, and proceed against the offender for, any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts: and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

*Indictment.*

Middlesex to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, being then and there employed as clerk ("*clerk or servant or any person employed for that purpose, or in the capacity of a clerk or servant*") to J. N., did, by virtue of his said employment, then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money ("*chattel, money, or valuable security,*" *see* 7 *&* 8 *G.* 4, *c.* 29, *s.* 5, (*ante, p.* 213)), to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his master, and the said money then and there fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. then and there, in manner and form aforesaid, the said money, the property of the said J. N., his said master, from the said J. N., feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the prisoner has been guilty of other acts of embezzlement within the period of six months, the following count may be added:*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the —— day of ——, in the year aforesaid, at the parish aforesaid, in the

county aforesaid, being then and there employed as clerk to the said J. N., did, by virtue of such last-mentioned employment, then and there, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his said Master and the said last-mentioned money then and there within the said six calendar months, fraudulently and feloniously did embezzle; and so, &c., *as in the first count, to the end. Add a count for larceny by the defendant as clerk, and for a simple larceny. R.* v. *Johnson,* 3 *M. & Sel.* 549. *Any number of acts not exceeding three, committed against the same Master within six calendar months from the first to the last of such acts, may be charged in the indictment.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 48. *And the proper course is to charge them in separate counts: Reg.* v. *Purchase, C. & Mar.* 617. *The indictment must shew by express words that the different sums were embezzled within the six months. Id. Before the late act, it was necessary, in all cases of embezzlement, to state specifically in the indictment some article embezzled. R.* v. *Furneaux, R. & R.* 335: *R.* v. *Flower,* 8 *D. & R.* 512: *R.* v. *Tyers, R. & R.* 402. *But now, in every case,* (*except where the offence relates to a chattel, which must be described as in an indictment for larceny*), *it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security:* 7 *&* 8 *G.* 4, *c.* 29, *s.* 48; *nor is it necessary that the exact amount or value of the thing embezzled should be stated. R.* v. *Carson, R. & R.* 303. *The indictment must allege the goods, &c., embezzled to be the property of the master; R.* v. *M'Gregor,* 3 *Bos. & P.* 106; *R. & R.* 23: *R.* v. *Beacall,* 1 *Mood. C. C.* 15; *and it has been said that it must shew that the defendant was servant, &c. at the time. R.* v. *Somerton,* 7 *B. & C.* 463: *see however Reg.* v. *Lovell,* 2 *M. & Rob.* 236. *It is usual and prudent to state that the defendant feloniously did embezzle, &c., but it is not absolutely necessary, if the conclusion state that he feloniously stole. R.* v. *Crighton, R. & R.* 62. *It is not necessary to state from whom the money, &c., was received. R.* v. *Beacall,* 1 *C. & P.* 454. *But as this may operate as a hardship upon the prisoner, the judge before whom he is to be tried will, upon application, order the prosecutor to furnish the prisoner with a particular of the charge. R.* v. *Bootyman,* 5 *C. & P.* 300: *R.* v. *Hodgson,* 3 *C. & P.* 422. *As to the venue, see ante, p.* 26.

*Declared to be larceny, and punishable with transportation for not more than fourteen nor less than seven years, or by imprisonment* (*with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding three years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 47.

*As to embezzlement by officers and servants of the Bank of England, see* 15 *G.* 2, *c.* 13, *s.* 12; 35 *G.* 3, *c.* 66, *s.* 6; 37 *G.* 3, *c.* 46, *s.* 6; 4 *&* 5 *Vict. c.* 56, *s.* 1: *R.* v. *Astlett, R. & R.* 67: *R.* v. *Bakewell, R. & R.* 35: *by officers and servants of the South Sea Company, see* 24 *G.* 2, *c.* 11, *s.* 3, *and* 4 *&* 5 *Vict. c.* 56, *s.* 1. *As to embezzlements by persons to whom money or securities for money shall be issued for the public service, see* 2 *W.* 4, *c.* 4, *s.* 1, *and Reg.* v. *Lovell,* 2 *M. & Rob.* 236. *As to embezzlements of letters, &c. by servants of the post-office see* 7 *W.*

*4 & 1 Vict. c. 36, s. 26, (ante, p. 217). And see R.* v. *Pooley, R. & R. 12: R.* v. *Ellins, Id. 188: R.* v. *Ranson, Id. 232: R.* v. *Plumer, R. & R. 264: R.* v. *Sharpe, 1 Mood. C. C. 125: Reg.* v. *Townsend, 1 C. & Mar. 178. As to embezzlement of naval and military stores, see post, Part 2, Sect. 6; and as to embezzlement from Chelsea Hospital, see 7 G. 4, c. 16; from Greenwich Hospital, 54 G. 3, c. 110; and 10 G. 4, c. 26; from poorhouses, 55 G. 3, c. 137; and from warehouses through the misconduct of custom-house officers, see 3 & 4 W. 4, c. 57, s. 41. As to embezzlement by clerks and other officers of joint stock banking companies, see 7 G. 4, c. 46; 1 & 2 Vict. c. 96; 8 & 9 Vict. c. 00; Reg.* v. *Atkinson, 2 Mood. C. C. 278; C. & Mar. 525; (ante, p. 33). As to embezzlements of materials, tools &c., by persons employed in the woollen, worsted, linen, cotton, flax, mohair, or silk manufactures, see 6 & 7 Vict. c. 40, ss. 2, 3, 11. As these several offences rarely occur in practice, it is deemed unnecessary to give the forms of indictment and the evidence necessary to support them.*

*Evidence.*

Prove that the defendant, at the time he received the chattel, money, or valuable security was the clerk or servant of J. N., or employed for the purpose or in the capacity of a clerk or servant as stated in the indictment. A female servant is within the meaning of the act. *R.* v. *Smith, R. & R.* 267. So is an apprentice, though under age. *R.* v. *Mellish, R. & R.* 80. The statute is not confined to the clerks and servants of persons in trade, but extends to the clerk and servants of all persons whomsoever, if they be employed to receive money, &c.; and therefore a person employed as accountant and treasurer to the overseers of the poor, whose duty it is to receive and pay monies receivable and payable to them, is a clerk and servant within the statute. *R.* v. *Squire, R. & R.* 349. A collector of poor and other rates within the parish of St. Paul, Covent Garden, was held to be rightly described as servant to the committee of management of the affairs of that parish (appointed under the stat. 10 *G.* 4, *c.* 87), though he was elected by the vestrymen of the parish. *Reg.* v. *Callahan,* 8 *C. & P.* 154. So, a clerk of a savings' bank was held to be properly described as clerk to the trustees, though elected by the managers. *R.* v. *Jenson,* 1 *Mood. C. C.* 434. The mode by which the defendant is remunerated for his service is immaterial. Where a defendant, who was employed as master of a barge, to carry out and sell coals, &c., was allowed a proportion of the profits, after deducting the price of the coals at the colliery, for his labour, took a quantity of coals, sold them, received the price, and absconded with the money; it was holden by a majority of the judges, that he was a servant within the meaning of the act. *R.* v. *Hartley, R. & R.* 139. So, where the defendant was employed as traveller to take orders and collect money, was paid by a percentage upon the orders he got, paid his own expenses, did not live with the prosecutors, and was employed as traveller by other persons also; he was holden to be a clerk to the prosecutors, within the meaning of the act. *R.* v. *Carr. R. & R.* 198: *R.* v. *Hoggins, Id.* 145. It is not necessary that the employment should be permanent; if it be only occasional, it will be sufficient. Where the prosecutor, having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds,

which he received and embezzled, he was holden to be a servant within the meaning of the act. *R.* v. *Spencer*, *R. & R.* 299: *see R.* v. *Smith*, *Id.* 316. And where a drover, who was employed to drive two cows to a purchaser, and receive the purchase-money, embezzled it, he was holden to be a servant within the meaning of the act. *R.* v. *Hughes*, 1 *Mood. C. C.* 370. But where the treasurer of a charitable institution, in his individual capacity, directed the defendant (who was the schoolmaster of the charity school, appointed by a committee of which the treasurer was a member, and whose sole duty was confined to the instruction of the children) in one single instance to receive a voluntary contribution, for which he was to have no remuneration; it was holden that he was not a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant. *R.* v. *Nettleton*, 1 *Mood. C. C.* 259. A member of, and secretary to, a society, who fraudulently withheld money received from a member, to be paid over to the trustees, was held to be guilty of embezzlement, and to be properly described as the clerk and servant of the trustees, and the money to be properly stated as their property, although the money ought in the ordinary course to have been received by the steward; and although the articles of the society were not enrolled, and the society was not conducted strictly according to the act of Parliament. *R.* v. *Hall*, 1 *Mood. C. C.* 474: *Reg.* v. *Miller*, 2 *Mood. C. C.* 249. But a person cannot be convicted of embezzlement as clerk and servant to a society which, in consequence of administering an unlawful oath to its members, is an unlawful combination and confederacy within the stats. 37 *G.* 3, *c.* 123, *and* 57 *G.* 3, *c.* 19. *Reg.* v. *Hunt*, 8 *C. & P.* 642. A prisoner who had been employed, sometimes as a regular labourer, sometimes as a roundsman for a day at a time, and had on several occasions been sent to a banker's to receive the amount of checks, was sent to the banker's with a check for payment, for which he was to receive 6*d.*, he not being in the prosecutor's employment at the time; he received the money for the check, and embezzled it, and being indicted for the embezzlement, *Park*, J., (after consulting *Taunton*, J.), held, that he was not a clerk or servant within the meaning of the act of Parliament. *R.* v. *Freeman*, 5 *C. & P.* 534. The person employed to collect the sacrament-money from the communicants is not the servant of the minister, churchwardens, or poor. *R.* v. *Burton*, 1 *Mood. C. C.* 237. In *R.* v. *Leach*, 3 *Stark. N. P.* 70, it was holden by *Bayley*, J., that if the clerk of several partners embezzle the private money of one of them, it is an embezzlement within this act; for he is a servant of each. So, where a traveller is employed by several persons, and paid wages, to receive money, he is the individual servant of each. *Per Bayley*, J., *Ib.*: *R.* v. *Carr*, *R. & R.* 198: *Reg.* v. *Batty*, 2 *Mood. C. C.* 257. So, a coachman, employed by one proprietor of a coach to drive a certain part of the journey, and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money, when received, would belong to him and his partners. *Reg.* v. *White*, 2 *Mood. C. C.* 91; 8 *C. & P.* 742.

Prove that the defendant received the money, &c., stated in the indictment, for or in the name or on the account of his master, by virtue of his employment as such clerk, &c. If the indictment allege that the defendant received chattels, the articles described, or some part of them, must be proved, as in larceny; but if the receipt

of "money" be alleged, the prosecutor may give in evidence the receipt of any species of coin or valuable security, or a receipt of any amount, although the particular species of coin or valuable security, of which such amount was composed, shall not be proved. 7 *&* 8 *G.* 4, *c.* 20, *s.* 48, (*ante, p.* 275). A variance between the indictment and the evidence, as to the amount received, is immaterial. *R.* v. *Carson, R. & R.* 303. It must appear that the defendant received the money, &c., for or in the name of, or on account of, his master. Money received by the defendant from the master himself, for the purpose of paying it to a third person, is not within the meaning of the act. *R.* v. *Peck,* 2 *Russ.* 213: *R.* v. *Smith, R. & R.* 267. So neither is money which is constructively in the possession of the master by the hands of any other clerk. *R.* v. *Murray,* 1 *Mood. C. C.* 276; 5 *C. & P.* 146. But where the master gave a stranger some marked money, for the purpose of purchasing goods from the master's shopman, in order to try the shopman's fidelity, which he doubted; the stranger bought the goods, and the shopman embezzled the money; the judges held this to be a case within the act. *R.* v. *Headge,* 2 *Leach,* 1033; *R. & R.* 160. A defendant, whose business it was to receive orders, to take the materials from his master's shop, work them up, deliver the goods, receive the price for them, and pay it over to his master, who, at the end of the week, paid the defendant a proportion of the price for his work, received an order for certain goods, took his master's materials, worked them up on his premises, delivered them, and received the price, but concealed the transaction, and embezzled the money; upon a conviction for embezzlement, it was doubted whether this was not a larceny of the materials, rather than a case within the statute; the judges held the conviction right. *R.* v. *Hoggins, R. & R.* 145. But where it appeared that the defendant was employed as a town-traveller and collector, to receive orders from customers, and enter them in the books, and receive the money for the goods supplied thereon, but had no authority to take or direct the delivery of goods from his master's shop: and a customer having ordered two articles of the defendant, he entered one of them only in the order-book, for which an invoice was made out by the prosecutor to the customer; but the defendant entered the price of the other at the bottom of the invoice, and having caused both to be delivered to the customer, received the price of both, and accounted to the prosecutor only for the former: this was held not to be embezzlement, but larceny. *Reg.* v. *Wilson,* 9 *C. & P.* 27. It must appear also, that the money, &c., so embezzled, was never, even constructively, in the possession of the master, for if it were, the offence would amount to larceny at common law; (*see ante, pp.* 186—190); and the defendant should therefore be acquitted upon an indictment on this statute. And this is the reason why it is advisable to add a count for a larceny at common law. If the defendant's receipt for the money be offered in evidence, it cannot be received unless stamped (if it be of an amount to require a stamp), in the same manner as upon the trial of a civil action. *R.* v. *Hall,* 3 *Stark.* 67, 68.

It must also appear that the defendant received the money, &c., by virtue of his employment; *see R.* v. *Prince, Moo. & M.* 21; for the embezzlement of money by a servant not authorised to receive it, is not within the statute; *R.* v. *Thorley,* 1 *Mood. C. C.* 343; although the party paying it to him supposes that he is so authorised. *R.* v.

*Hawtin*, 7 *C. & P.* 281. Where a servant employed generally to receive sums of one description, and at one place only, is employed by his master in a particular instance to receive a sum of a different description, at a different place, this latter sum is to be considered as received by him by virtue of his employment; he fills the character of servant, and it is by being employed as servant that he receives the money. *R.* v. *Smith*, *R. & R.* 516. *See R.* v. *Barker*, 1 *D. & R. N. P.* 19. So, where a defendant, whose duty it was to receive from his master's partners the money they received in the course of the day, and to pay it over the following day, but it was not his duty, nor was he expected, in the course of his employment, to receive money from the customers themselves, called upon a customer of his master for the amount of his account, which he received and embezzled, it was holden that he received the money by virtue of his employment; and the judges thought that the receiving immediately from the customer, instead of one dealing with the parties, was such a receiving as the statute was meant to protect. *R.* v. *Beechey*, *R. & R.* 319. But where a butcher's apprentice, who had never been employed to receive money, carried a bill to the house of a customer, received the money, and embezzled it, it was holden that the money was not received by virtue of his employment, because the defendant was never employed to receive money. *R.* v. *Mellish*, *R. & R.* 80; *and see R.* v. *Nettleton*, 1 *Mood. C. C.* 259, (*ante*, *p.* 278). So, where one employed to lead a stallion, with authority to charge and receive a fixed sum, but not less, received a less sum and embezzled it, this was holden not to be within the statute, because the money was not received by virtue of his employment. *R.* v. *Snowley*, 4 *C. & P.* 390. But where the money was paid to the defendant as the servant of the prosecutor, and it appeared that he was authorised to receive money for his master, although not from the particular class of customers of whom the party paying it him was one, this was held sufficient. *R.* v. *Williams*, 6 *C. & P.* 626.

And, lastly, prove that the defendant embezzled the money, &c., so received, or some part of it. The usual presumptive evidence of this fact is, that the defendant never accounted with his master for the money, &c., so received by him, or denied his having received it. The prosecutor gave to his housekeeper, the defendant, a sum of money to pay to the overseer, and upon an indictment for embezzling the sum, the overseer proved that he never had received that or any other sum from the defendant; but it was holden, that the non-payment of the money to the overseer did not prove an actual embezzlement, but merely a non-application of the money as directed. *R.* v. *Smith*, *R. & R.* 267. So, where the prisoner charged himself in his master's book with money received by him, but did not pay it over to the master:—*Vaughan*, B., held that an embezzlement was not proved. *R.* v. *Hodgson*, 3 *C. & P.* 422. And if, instead of denying the appropriation of the money, the party, in rendering his account, admits it, alleging a right in himself, however unfounded, or setting up an excuse, however frivolous, he cannot be convicted of embezzlement, which implies secrecy and concealment; *Reg.* v. *Norman*, *C. & Mar.* 501; even though he afterwards abscond and do not *pay over* the money. *Reg.* v. *Creed*, 1 *C. & K.* 63. So also, the mere proof of the receipt of the money by the defendant, and his not having entered it in his books, without some evidence to shew that

he has denied the receipt of it, or the like, is not sufficient to convict. *R.* v. *Jones*, 7 *C. & P.* 833. But where it is the servant's duty to account for and pay over the monies received by him at stated times, his not doing so wilfully is an embezzlement, although he do not actually deny the receipt of them. *Reg.* v. *Jackson*, 1 *C. & K.* 384. Where the defendant received payment of a debt from one of his master's customers in Bank of England notes, but accounted with his master for 6*l.* less than he received; and afterwards delivered some Bank of England notes to his master upon another account: it being argued for the defendant that these must be presumed to be the same bank-notes which were received from the customer, and being actually delivered to the master, could not be said to be embezzled:—*Bayley*, J., ruled, that these notes, to the amount of 6*l.*, must be deemed to have been embezzled within the meaning of the act, the moment the defendant accounted for 6*l.* less than he received, and that his afterwards paying these identical notes to his master in another account made no difference; which decision was afterwards confirmed by the judges. *R.* v. *Hall*, 2 *Stark. N. P.* 67; *R. & R.* 463. The difficulty in this case, and in that of *R.* v. *Hebb*, 2 *Russ.* 1244, 1*st ed.*, which arose from the necessity of proving the embezzlement of some specific note or coin, is removed by the recent statute. If the embezzlement be alleged to be of money, without specifying any particular coin or valuable security, such allegation, so far as regards the description of the property, will be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. 7 & 8 *G.* 4, *c.* 29, *s.* 48, (*ante, p.* 275). In *R.* v. *Grove*, 1 *Mood. C. C.* 447; 7 *C. & P.* 635, a majority of the judges are reported to have held, that, since this statute, an indictment for embezzlement might be supported by proof of a general deficiency of monies that ought to be forthcoming, without shewing any particular sum received and not accounted for. But see *Reg.* v. *Lloyd Jones*, 8 *C. & P.* 288, where it was stated that the decision in *R.* v. *Grove* proceeded upon the peculiar facts of that case, and not upon any such general principle: *see also Reg.* v. *Chapman*, 1 *C. & K.* 119.

Where the indictment contains only one count, charging the receipt of a gross sum on a particular day, and it appears in evidence that the money was received in different sums on different days, the prosecutor will be put to his election, and must confine himself to one sum and one day. *R.* v. *Williams*, 6 *C. & P.* 626.

It seems that it is not necessary to allege or prove the embezzling to have taken place while the prisoner continued clerk or servant to the prosecutor. *Reg.* v. *Lovell*, 2 *M. & Rob.* 236.

BY BANKERS, &c.

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*Statute.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 49]—For the punishment of embezzlements committed by agents intrusted with property, enacts, that if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money or any part thereof, or the proceeds, or any part of the proceeds of such security, for any purpose specified in such direction, and he shall in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel, or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned. *s.* 46, (*ante*, *p.* 193).

Sect. 50—*Not to affect Trustees or Mortgagees, nor to prevent Bankers from receiving Money, or disposing of Securities, &c., on which they have a Lien*]—Provides and enacts, that nothing hereinbefore contained relating to agents shall affect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage: nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling

him by law so to do, unless such sale, transfer, or other disposal, shall extend to a greater number or part of such securities and effects than shall be requisite for satisfying such lien, claim, or demand.

Sect. 52—*Not to affect the Remedy of the Party grieved—Bankers, &c., and Factors, protected in certain Cases*]—Provides and enacts, that nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence would have had, if this act had not been passed; but nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

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*Indictment against Bankers, &c., for embezzling Money lodged with them for specific purposes.*

Middlesex to wit:—The jurors for our lady the Queen upon their oath present, that on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of B., in the county of M., J. N. did intrust J. S., the said J. S., then and there being a banker and agent, ("*banker, merchant, broker, attorney, or other agent*") with a certain large sum of money, ("*money, or the security for the payment of money*"), to wit, the sum of one hundred pounds, with a direction to the said J. S. in writing to apply the said sum of money ("*such money or any part thereof, or the proceeds, or any part of the proceeds of such security*") for a certain purpose then and there specified in the said direction, ("*any purpose specified in such direction*"); and that the said J. S., late of the parish aforesaid in the county aforesaid, banker and agent as aforetaid, afterwards to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, in violation of good faith, and contrary to the purpose so as aforesaid specified, unlawfully did convert to his own use and benefit ("*own use or benefit*") the said sum of money ("*such money, security, or proceeds, or any part thereof respectively*"), so to him intrusted as aforesaid, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *In the case of a security for money, the indictment must allege a written direction as to the application of the proceeds. Reg. v. Golde, 2 M. & Rob. 425. Add a count stating the purpose to which the money was to be applied.*

*Misdemeanor, transportation for not more than fourteen nor less than seven years, or fine or imprisonment, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 29, s. 4, (ante, p. 169), such confine-*

*ment not exceeding one month at any one time, nor three months in any one year*, 7 *W.* 4 *&* 1 *Vict. c.* 9, *s.* 5, (*ante, p.* 169)), *or both.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 49.

*Evidence.*

Prove that the defendant was a banker, agent, &c., as stated in the indictment—that the money, &c., was intrusted to him—that directions in writing were given for the application of the money, &c.: this must be proved by the production of the directions, or by secondary evidence, after notice to produce the original; (*see ante, p.* 113); and lastly, prove that the defendant, instead of applying the money, &c. as directed, converted it to his own use and benefit. If the particular purpose be stated in the indictment, the evidence must correspond with the allegation. An allegation of a specific direction to invest the proceeds of valuable securities in the funds, is not supported by evidence of a direction to invest in the funds, in the event of any unexpected accident occurring. *R.* v. *White*, 4 *C. & P.* 46. The statute does not affect trustees or mortgagees, for any act done by them in respect of the property comprised in or affected by the trust or mortgage; nor does it restrain bankers, &c. from receiving money due and payable upon or by virtue of any valuable security; *see Thompson* v. *Giles*, 2 *B. & C.* 422; or from selling, transferring, or disposing of securities or effects in their possession, upon which they have a lien, claim, or demand; unless the sale, &c., be to a greater extent than is necessary to satisfy such lien, &c. 7 *&* 8 *G.* 4, *c.* 29, *s.* 50, (*ante, p.* 282). And no banker, &c. shall be convicted by any evidence in respect of any act done by him, if, at any time previously to his being indicted, he shall have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt. 7 *&* 8 *G.* 4, *c.* 29, *s.* 52, (*ante, p.* 283).

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*Indictment against Bankers, &c., for embezzling Goods, &c., intrusted to them for safe keeping, &c.*

*Commencement as in the last precedent*]—J. N. did intrust to J. S., for safe custody, ("*for safe custody, or for any special purpose*"), the said J. S. then and there being a banker and agent ("*banker, merchant, broker, attorney, or other agent*") a promissory note ("*any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society*"), of one J. P. for the payment of twenty pounds, without any authority to him the said J. S. to sell, negotiate, transfer, or pledge the said promissory note; and that the said J. S., late of the parish aforesaid, in the county aforesaid, banker and agent as aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, in violation of good faith, and contrary to the object and purpose for which such promissory note was intrusted to him as aforesaid, unlawfully did negotiate and convert to his own use and benefit ("*sell,*

*negotiate, transfer, pledge, or in any manner convert to his own use or benefit"*) the said promissory note (*"such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof"*); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, 7 & 8 G. 4, c. 29, s. 49, punishable as in the last precedent.*

*Evidence.*

Prove that the defendant was a banker and agent, &c., as stated in the indictment—that the note or other security described in the indictment was intrusted to him for safe custody, or for the special purpose stated—that no authority was given to him to negotiate the note—and lastly, that he negotiated the note, and converted it to his own use and benefit, as stated in the indictment. See the provisions of the statute, 7 & 8 *G.* 4, *c.* 29, *ss.* 50, 52, in the last case, which apply to an indictment for this offence also.

BY FACTORS.

*Statute.*

5 & 6 *Vict. c.* 39, *s.* 6]—Enacts, that if any agent intrusted as aforesaid [with the possession of goods, or of the documents of title to goods, *s.* 1 ; *see s.* 4] shall, contrary to or without the authority of his principal in that behalf, for his own benefit, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or documents of title so intrusted to him as aforesaid, as or by way of a pledge, lien, or security ; or shall, contrary to or without such authority, for his own benefit, and in violation of good faith, accept any advance on the faith of any contract or agreement, to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, every such agent shall be deemed guilty of misdemeanor, and being convicted thereof, shall be sentenced to transportation for any term not exceeding fourteen years, not less than seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award ; and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be deemed guilty of misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court shall award as hereinbefore last mentioned: provided nevertheless, that no such agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such consignment, deposit, transfer, or delivery, was justly due or owing to such agent from his principal, together with

the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent; provided also, that the conviction of any such agent so convicted as aforesaid shall not be received in evidence in any action at law or suit in equity against him; and no agent intrusted as aforesaid shall be liable to be convicted by any evidence whatsoever in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act on oath in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioner of bankrupt.

*Indictment.*

*Commencement as ante, p.* 283]—J. N. did intrust to J. S., the said J. S. then and there being an agent of him the said J. N., ten bales of cotton of the value of fifty pounds ("*intrusted with the possession of goods, or of the documents of title to goods*"); and that the said J. S., late of the parish aforesaid, in the county aforesaid, agent as aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, contrary to and without the authority of the said J. N., for his own benefit, and in violation of good faith, unlawfully did make a deposit of the said ten bales of cotton with one J. P., as and by way of a pledge, lien, and security for a certain sum of money, to wit, the sum of fifty pounds, then advanced by the said J. P. to him the said J. S.: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, transportation for not more than fourteen nor less than seven years, or fine or imprisonment, (with or without hard labour for the whole or any part of such imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 29, s. 4, (ante, p. 169), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169)), or both. 5 & 6 Vict. c. 39, s. 6. See also the 7 & 8 G. 4, c. 29, ss. 51, 52.*

*Evidence.*

Prove that the goods, &c., described in the indictment were intrusted by J. N. to the defendant, as his agent, that the defendant deposited the goods with J. P., as a security for an advance of money, &c.; and, lastly, circumstances must be shewn from which the jury may infer that the defendant pledged the goods in violation of good faith, and contrary to and without the authority of the prosecutor. A factor who has a lien upon goods may pledge them to the extent of his lien. 5 & 6 *Vict. c.* 39, *s.* 6. And if he have, previously to the indictment, disclosed the act on oath under compulsory process of any court of law or equity, in any action, &c., *bonâ fide* instituted by any party grieved, or in any examination or deposition before any commissioner of bankrupt, he cannot be convicted by any evidence whatever. *Id.* The conviction will not be evidence against the defendant in any action at law or suit in equity against him. *Id.* As to what is an *intrusting* within the statute, and what are to be

considered as documents of title to goods, *see Sect.* 4. *See also the 6 G.* 4, *c.* 94.

BY BANKRUPTS.

*Statute.*

5 & 6 *Vict. c.* 122, *s.* 32]—Enacts, that if any person adjudged bankrupt after the commencement of this act shall not, upon the day limited for the surrender of such bankrupt, and before three of the clock of such day, or at the hour and day allowed him for finishing his examination, after notice thereof in writing to be left at the usual or last known place of abode or business of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the fiat, and of the sittings of the court authorised to act in the prosecution of the fiat against him, surrender himself to such court, and sign or subscribe such surrender, and submit to be examined before such court from time to time upon oath; or if any such bankrupt, upon such examination, shall not discover all his real and personal estate, and how, and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and *bonâ fide* before sold or disposed of in the way of his trade, or laid out in the ordinary expense of his family); or if such bankrupt shall not upon such examination deliver up to the said court all such part of such estate, and all books, papers, and writings relating thereunto, as shall be in his possession, custody, or power (except the necessary wearing apparel of himself, his wife, and children); or if any such bankrupt shall remove, conceal, or embezzle any part of such estate, to the value of 10*l.* or upwards, or any books of account, papers, or writings relating thereunto, with intent to defraud his creditors; every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge, or shall be liable to be imprisoned, with or without hard labour, in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years.

*Indictment.*

Middlesex to wit:—The jurors for our lady the Queen upon their oath present, that heretofore and before the committing of the offence hereinafter mentioned, to wit, on the third day of July, in the ninth year of the reign of our sovereign lady Victoria, at the parish of B., in the county aforesaid, J. S., late of the parish aforesaid, in the county aforesaid, tailor, being a trader within the meaning of the laws relating to bankrupts, was indebted to J. N., late of ———, in a certain sum of money exceeding the sum of 50*l.*, to wit, in the sum of 60*l.*, for the price and value of certain goods and merchandize before then sold and delivered by the said J. N. to the said J. S., (*or as the case may be*), and that the said J. S., so being such trader, and

indebted as aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did commit an act of bankruptcy, that is to say, by departing from his dwelling-house, with intent thereby to defeat and delay his creditors, (*or as the case may be*). And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the third day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, a fiat in bankruptcy was issued against the said J. S., and the said J. S. was thereupon then and there duly declared bankrupt; and the said J. S., so being declared bankrupt as aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did remove, conceal, and embezzle a certain part of his personal estate, to the value of ten pounds and upwards, that is to say, one gold watch, of the value of ten pounds, one silver cream jug of the value of one pound, and one ring of the value of five pounds, with intent then and there to defraud the creditors of him the said J. S.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The indictment must still shew that the party has duly become bankrupt, and must therefore state the trading, petitioning creditor's debt, and act of bankruptcy.* *R.* v. *Jones*, 4 *B. & Ad.* 345. *For other offences against this statute, see post, Part II, Ch. II.*

*Felony, transportation for life or for not less than seven years, or imprisonment, with or without hard labour, in the common gaol, penitentiary, or house of correction, not exceeding seven years.* 5 & 6 *Vict. c.* 122, *s.* 32. *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

For embezzlements by insolvents, see stats. 7 *G.* 4, *c.* 57, *s.* 70; 1 & 2 *Vict. c.* 110, *s.* 100; *and see R.* v. *Champneys*, 2 *M. & Rob.* 25. *The indictment may be framed from the above, after an attentive perusal of the statute. The wilful and fraudulent omission, by an insolvent debtor, from his schedule, of any of his effects, is indictable as a misdemeanor.* 1 & 2 *Vict. c.* 100, *s.* 99. *See Reg.* v. *Marner, C. & M.* 628.

*Evidence.*

Prove the fiat by producing it enrolled, *see stat.* 6 *G.* 4, *c.* 16, *s.* 95; 1 & 2 *W.* 4, *c.* 56, *s.* 16, and the adjudication in the same manner. Prove also the trading, petitioning creditor's debt, and act of bankruptcy. *See R.* v. *Jones, supra. And see* 5 & 6 *Vict. c.* 122, *s.* 25.

Prove, also, the embezzlement as stated in the indictment, and that the value of the property embezzled is 10*l.* Where an indictment specified various articles, without stating the value, and added "one hundred other articles of furniture, and a certain debt due from J. T. to the prisoner, of the value of 20*l.* and upwards," the judges held that the indictment was good only as regarded the articles specified; and as an entire value was given to the whole, it did not appear that the articles specified were of the value required by the statute. *R.* v. *Forsyth, R. & R.* 274. Up to and until his last examination, the bankrupt has a *locus pœnitentiæ*, and cannot therefore, until that be passed, be indicted for concealing property, which he may upon his last examination give up. *R.* v. *Walters,* 5 *C. & P.* 138.

The intent must be proved by circumstances from which the jury may infer it.

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## Sect. 3.

### CHEATING.

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*Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 53]—Whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud; for remedy thereof be it enacted, that if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award; provided always, that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by *certiorari;* and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

*Indictment for obtaining Goods, &c., by false Pretences.*

*Commencement as ante, p.* 169]—in the county aforesaid, unlawfully, knowingly, and designedly, did falsely pretend to one J. N. [*that the said J. S. then was the servant of one K. O., of St. Paul's Churchyard, in the city of London, tailor, (the said K. O. then and long before being well-known to the said J. N., and a customer of the said J. N. in his business and way of trade as a woollen draper), and that the said J. S. was then sent by the said K. O. to the said J. N. for five yards of superfine woollen cloth*]; by means of which said false pretences, the said J. S. did then and there unlawfully obtain from the said J. N. five yards of superfine woollen cloth of the value of five pounds, of the goods ("*any chattel, money, or valuable security,*" *see* 7 & 8 *G.* 4, *c.* 29, *s.* 5, (*ante, p.* 213)) of the said J. N., with intent then and there to cheat and defraud him the said J. N. of the same; whereas in truth and in fact [*the said J. S. was not then the servant of the said K. O; and whereas in truth and in fact the said J. S. was not then or at any other time sent by the said K. O. to the said J. N. for the said cloth, or for any cloth whatsoever*]; to the great damage and deception of the said J. N., to the evil example of all others in the like case offending; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *An indictment, which stated that the prisoner "unlawfully, knowingly, and designedly did* feloniously *pretend," &c., was held bad. R.* v. *Walker,* 6 *C. & P.* 657.

*Misdemeanor, transportation for seven years, or fine or imprisonment (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 29, s. 4, (ante, p. 169), such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169)), or both. 7 & 8 G. 4, c. 29, s. 53. All parties who have concurred and assisted in the fraud may be indicted and convicted as principals, though not present at the time of making the pretence and obtaining the money or goods. Reg. v. Moland, 2 Mood. C. C. 276.*

*For frauds punishable by particular statutes, see 2 Russ. 314. As to the punishment of bankrupts who have fraudulently obtained goods under the false pretence of carrying on business in the ordinary course of trade, see 5 & 6 Vict. c. 122, s. 35. By 8 & 9 Vict. c. 109, s. 17, winning at play by fraud is punishable as for obtaining money by false pretences. (See post, Chap. V, Sect. V).*

The indictment must set forth the pretences. Where it alleged the money to have been obtained by "*false pretences,*" without specifying them, it was holden to be error, and the judgment was reversed. *R.* v. *Mason*, 2 *T. R.* 581. If, indeed, it were for a conspiracy to obtain money by false pretences, it seems it would be otherwise. 2 *B. & Ad.* 204; *see* 1 *Dav. & M.* 208.

And the pretences must be set forth with sufficient certainty. But where the pretence alleged was a wager made "with a colonel in the army, then at Bath," without naming him—the court held it to be sufficient; for probably the defendant at the time did not mention the name of the colonel. *R.* v. *Young*, 3 *T. R.* 98; 2 *East, P. C.* 82, 833; 1 *Leach*, 505.

As to the false pretences which are within the meaning of the act, it may be necessary to state, that the preceding statute upon this subject, namely, the statute 33 *H.* 8, *c.* 1, extended only to cases where the money, &c., was obtained by means of a false token or counterfeit letter in the name of another; but this provision not being deemed sufficiently extensive, the stat. 30 *G.* 2, *c.* 24, was made, for the purpose of including all false pretences whatsoever. These two statutes, the former entirely, and the latter so far "as relates to obtaining by false pretence or pretences any property as therein mentioned;" and also the whole of the statute 52 *G.* 3, *c.* 64, which extended the provisions of the 30 *G.* 2, *c.* 24; and also so much of the statute 3 *G.* 4, *c.* 114, as relates to the punishment for obtaining any property as therein mentioned by false pretences—are repealed by stat. 7 & 8 *G.* 4, *c.* 27, and consolidated and amended by stat. 7 & 8 *G.* 4, *c.* 29, *s.* 53, which has substituted the words "by any false pretence," for the words "by false pretence or pretences," which were in the stat. 30 *G.* 2, *c.* 24, *s.* 1. The phrases in both statutes are in substance the same, and consequently the decisions upon the repealed statute will be applicable to cases arising under the new act.—Where a carrier, falsely pretending that he had carried certain goods to A. B., demanded, and thereupon obtained from the consignor, sixteen shillings for the carriage of them, it was holden to be within the statute. *R.* v. *Coleman*, 2 *East, P. C.* 672: *see R.* v. *Airey*, 2 *East*, 30. Where the foreman of a manufacturer, who was in the habit of receiving from his master money to pay the workmen, obtained from him, by means of false written accounts of the wages earned by the men, more than the men had earned or he had paid them, the judges held

it to be within the act; they said that all cases where the false pretence creates the credit are within the statute; and here the defendant would not have obtained the excess above what was really due to the workmen, were it not for the false account he had delivered to his master. *R.* v. *Whichell*, 2 *East, P. C.* 830. Where the defendant falsely pretended to J. N., that he was entrusted by the Duke de Lauzun to take some horses from Ireland to London for him, and that he had been detained so long by contrary winds that his money was all spent, by means of which representation he induced J. N. to advance him money; this was holden to be within the act. *R.* v. *Villeneuve, Ib.* So, where the defendants, falsely pretending that they had made a bet with A. B. that one of them should run ten miles within an hour, prevailed upon J. N. to join them in the bet, and obtained from him twenty guineas as his share in it; the judges held this to be within the statute, notwithstanding the pretence was probably one against which common prudence might have guarded. *R.* v. *Young, in error*, 3 *T. R.* 98. Where an attorney, who had appeared for J. S., who was fined 2*l.* on a summary conviction, called on the wife of J. S., and told her that he had been with J. N., who was fined 2*l.* for a like offence, to Mr. B. and Mr. L., and that he had prevailed on Mr. B. and Mr. L. to take 1*l.* instead of 2*l.*, and that if she would give him 1*l.*, he would go and do the same for her; and she thereupon gave him a sovereign, and afterwards paid him for his trouble; and it was proved that the attorney never applied to Mr. B. or Mr. L. respecting either of the fines, and that both were afterwards paid in full: it was held that the attorney was guilty of obtaining money by false pretences. *R.* v. *Asterley*, 7 *C. & P.* 191. Obtaining as a loan, from the drawer of a bill accepted by the prisoner, and negociated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, was holden to be an offence within the statute, the prisoner being shewn not to be prepared, and not intending so to apply the money. *R.* v. *Crossley*, 2 *M. & Rob.* 18. Where the defendant obtained money from a woman under the threat of an action for breach of promise of marriage, he being in fact a married man already, an indictment, laying as the false pretence that he was entitled to maintain an action against her for the breach of promise, was held by *Maule*, J., to be good, for that this was a false pretence within the statute. *Reg.* v. *Copeland, C. & Mar.* 516. Where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title—*Littledale*, J., held that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as such, and the party be transported: *R.* v. *Codrington*, 1 *C. & P.* 661: but this decision has been much doubted; *see Reg.* v. *Kenrick*, 5 *Q. B.* 49; 1 *Dav. & M.* 208; where it was strongly intimated, that the execution of a *contract* between the same parties does not secure from punishment the obtaining of money under false pretences, in conformity with that contract. Where the indictment charged that the defendant, having in his possession a certain weight of twenty-eight pounds, falsely pretended to C. that a quantity of coals, which he delivered to C., weighed sixteen hundred-weight, (meaning 1792 pounds weight), and

were worth 1*l.*, and that the weight was fifty-six pounds, by means of which he obtained a sovereign from C., with intent to defraud him of part thereof, to wit, 10*s.*; whereas the coals did not weigh 1792 pounds, and were not worth 1*l.*, and whereas the weight was not fifty-six pounds, and whereas the coals were of the weight of 896 pounds only, and were not worth more than 10*s.*, and whereas the weight was twenty-eight pounds only; the judges held a conviction on the indictment wrong, on the ground that all the pretences, except that relating to the weight, were mere false affirmations, and that as to the weight, there was no allegation to connect the sale of the coals with the use of the weight. *R.* v. *Reed*, 7 *C. & P.* 848. So also, where the indictment charged the defendant with falsely pretending to the prosecutor, whose mare and gelding had strayed, that he would tell him where they were, if he would give him a sovereign down; and the prosecutor gave the sovereign, but the defendant refused to tell: the conviction was held bad; the indictment should have stated that he pretended he *knew* where they were. *R.* v. *Douglass*, 1 *Mood. C. C.* 462. An indictment against A. and B. charged that C. was possessed of a mare, and A. of a horse, and that A. and B. falsely pretended to C. that B. was then and there possessed of a certain sum of money, to wit, 12*l.*, and that if C. would exchange his mare for A.'s horse, B. was willing and ready to purchase the horse of C., and give him 12*l.* for it; whereas in truth and in fact B. was not then and there possessed of the said sum of 12*l.*, and was not then and there ready and willing to purchase the said horse of C., and to pay him the 12*l.*: and it was held bad, for not averring that the defendant *knew* that B. was not possessed of the 12*l.* *Reg.* v. *Henderson*, 2 *Mood. C. C.* 192; *C. & Mar.* 328. An indictment for obtaining money from A. under the false pretence that the defendant intended to marry A., and wanted the money to pay for a wedding suit he had bought, was held not sufficient to sustain a conviction. *Reg.* v. *Johnston*, 2 *Mood. C. C.* 254. It seems that a person who obtains from a pawnbroker, upon an article which he falsely represents to be silver, a greater advance than would otherwise have been made, is guilty of a false pretence within the statute; although the pawnbroker have the opportunity of testing the article at the time. *Reg.* v. *Ball*, *C. & Mar.* 249.

It is not necessary that the pretence should be in words; the conduct and acts of the party will be sufficient, without any verbal representation. Thus, if a person obtain goods from another upon giving him in payment his cheque upon a banker, with whom in fact he has no account, this (although not indictable as a fraud at common law, *R.* v. *Lara*, 6 *T. R.* 565: *see R.* v. *Flint*, *R. & R.* 460) is a false pretence within the meaning of the act. *R.* v. *Jackson*, 3 *Camp.* 370. Where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain; and the jury found, that, before the completion of the sale and delivery of the watch by the prosecutor to the prisoner, he represented to the prosecutor that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all which was false; and that he represented that the cheque would be paid on or after the day of the date, but that he had no reasonable ground to believe that

it would be paid, and that he had no funds to pay it; he was held to be properly convicted. *R.* v. *Parker*, 2 *Mood. C. C.* 1; 7 *C. & P.* 825. But where the indictment stated, that the defendant falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note, which he then delivered to A. B., was a valuable security for 21*l.*, by means of which false pretences he fraudulently obtained from A. B. 8*l.* 15*s.*; whereas the defendant was not a captain, &c., and the note was not a valuable security, &c.: it was holden, on error, that as it did not appear but that the note was the defendant's own promissory note, or that he *knew* it to be worthless, there was no sufficient false pretence in that respect; and as the two pretences were to be taken together, that the indictment was bad. *Reg.* v. *Wickham*, 10 *Ad. & Ell.* 34; 2 *Per. & D.* 333: *see also Reg.* v. *Philpotts*, 1 *C. & K.* 112. Where the prisoner passed the note of a country bank, which he knew had stopped payment, it appearing that one of the partners was solvent, *Gaselee*, J., held that he could not be convicted for obtaining money under false pretences. *R.* v. *Spencer*, 3 *C. & P.* 420. Where a man obtained goods and money for a forged note of hand for ten shillings and sixpence, the judges held it to be a false pretence within the act. *R.* v. *Freeth*, *R. & R.* 127. In a recent case, however, where the prisoner obtained goods by means of a forged order, *Taunton*, J., held that he could not be indicted for obtaining them by false pretences, but should have been indicted for forgery. *R.* v. *Evans*, 5 *C. & P.* 553: and the same has since been held by *Parke*, B., and *Coltman*, J., in *Reg.* v. *Anderson*, 2 *M. & Rob.* 471. Where a man assumed the name of another, to whom money was required to be paid by a genuine instrument, this was holden to be a pretence within the meaning of the act. *R.* v. *Story*, *R. & R.* 81. So where a person at Oxford, who was not a member of the university, went, for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods, this was held a sufficient false pretence to satisfy the statute, though nothing passed in words. *R.* v. *Barnard*, 7 *C. & P.* 784.

But the pretence must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property. Therefore a pretence that the party would do an act he did not mean to do, as a pretence to pay for goods on delivery, is not a false pretence within the act, but merely a promise for future conduct. *R.* v. *Goodhall*, *R. & R.* 461. And a pretence to a parish officer, as an excuse for not working, that the party has not clothes, when he really has, though it induce the officer to give him clothes, is not a pretence within the statute, the statement being rather a false excuse for not working than a false pretence to obtain goods. *R.* v. *Wakeling*, *R. & R.* 504. *See R.* v. *Reed*, 7 *C. & P.* 848, (*ante*, *p.* 292). A false pretence actually made to A. in B.'s hearing, whereby money be obtained from B., may be laid as made to B. *Reg.* v. *Dent*, 1 *C. & K.* 249.

The indictment also must negative the pretences by special averment, as in the above precedent; and where such an averment was omitted, it was holden to be error, and the judgment was reversed. *R.* v. *Perrott*, 2 *M. & Sel.* 379, 386.

The indictment must state that the money, &c. obtained, is the property of the person whom it was intended to defraud; since otherwise a conviction or acquittal on this indictment could not be

pleaded in bar to a subsequent indictment for larceny in respect of the same transaction. *R.* v. *Norton*, 8 *C. & P.* 197: *see Reg.* v. *Parker*, 3 *Q. B.* 292; 2 *G. & D.* 709. And this defect is not aided by verdict, but the indictment is bad on error. *R.* v. *Martin*, 8 *Ad. & E.* 481; 3 *Nev. & P.* 472.

The indictment is not removable by certiorari. 7 & 8 *G.* 4, *c.* 29, *s.* 53: *Reg.* v. *Butcher*, 9 *Dowl.* 135.

*Evidence.*

The prosecutor must prove the pretence, as stated in the indictment: any variance in substance between the pretence laid and that proved will be fatal. Where the pretence laid was, that the defendant said, "*that he had paid* a sum of money into the Bank of England," and the proof was, that he said that the money had been paid into the Bank, without saying by whom, the defendant was acquitted for the variance; *Lord Ellenborough* holding that the assertions were different in substance. *R.* v. *Plestow*, 1 *Camp.* 494: *see R.* v. *Douglas*, *Id.* 212. But it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient. *R.* v. *Hill*, *R. & R.* 190; 2 *Russ.* 310. If, however, two false pretences are laid as conducing to the fraud, and the jury find a general verdict of guilty, and it afterwards appear that one of them is not a sufficient false pretence within the statute, that will invalidate the indictment altogether on a writ of error. *Reg.* v. *Wickham*, (*ante*, *p.* 293). If the false pretence be in writing, it may be proved by secondary evidence, if the paper be lost before the trial. *R.* v. *Chadwick*, 6 *C. & P.* 18.

He must next prove that the goods, &c., stated in the indictment, or part of them, (for the rule in this respect is the same as in larceny, *see ante*, *p.* 170), were obtained from him by means of these pretences. If the indictment charge the defendant with having obtained, by means of certain false pretences, from J. B., a servant of J. N., the sum of three shillings and sixpence, the monies of J. N., and the evidence be, that J. B. in fact paid the three shillings and sixpence out of his own money in the first instance, and was afterwards repaid by J. N.; this would be a fatal variance. *R.* v. *Douglas*, 1 *Camp.* 212. But it appearing afterwards, in this case, that J. B. had, at the time, more money belonging to J. N. in his possession than the sum so paid by him, this was holden to support the averment, although he had no orders from J. N. to pay it. *Ib.* The words in the statute are "any money, chattel, or valuable security." Where a defendant was indicted for obtaining, under false pretences, a certain order for the payment of two pounds, and the order was a cheque drawn by A. B. upon his bankers, payable to D. F. J., but not to order or bearer, it was holden that this required a stamp, and, not being stamped, was not a valuable security. *R.* v. *Yates*, 1 *Mood. C. C.* 170. Where, in order to induce his bankers to pay his cheques, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid, in consequence of which the bankers paid money for him, it was holden not to be within the act, because he only obtained credit, and not any specific sum on the bill. *R.* v. *Wavell*, 1 *Mood. C. C.* 224. Where the prisoner was charged with obtaining a filly by the false pretence that he was a gentleman's servant, and had lived at Bream, and had bought twenty

horses at Bream fair; and it appeared that he bought the filly of the prosecutor for 11*l.*, making him this statement, which was false, and telling him also that he would come down to the Cross Keys and pay him: and the prosecutor stated that he parted with the filly because he expected the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant, &c.; the prisoner was held to be entitled to an acquittal. *R.* v. *Dale*, 7 *C. & P.* 352. But if the defendant obtain the money by a false pretence, knowing it to be false, it is no answer to shew that the party from whom he obtained it laid a plan to entrap him into the commission of the offence. *R.* v. *Ady*, *Id.* 140. Parol evidence may be given of the false pretences laid in the indictment, though a deed between the parties, stating a different consideration for parting with the money, be put in evidence for the prosecution; such deed having been made for the purpose of the fraud. *Reg.* v. *Adamson*, 2 *Mood. C. C.* 286; 1 *C. & K.* 192.

As to the intent, it may be implied sufficiently from the facts of the case. Where A. owed B. a debt, of which he could not get payment, and C., B.'s servant, went to A.'s wife, and obtained from her two sacks of malt, saying that B. had bought them of A., and C. knew this to be false, but took the malt to B., his master, to enable him to pay himself the debt, it was holden that C. could not be convicted of obtaining the malt by false pretences. *R.* v. *Williams*, 7 *C. & P.* 354. Formerly, if the evidence proved not only an intent to cheat or defraud, but also established a pre-existing *animus furandi*, and a constructive taking, such as to constitute larceny, the misdemeanor being merged in the felony, the defendant was entitled to his acquittal. *R.* v. *Pear*, 2 *East*, *P. C.* 689. But now, by stat. 7 & 8 *G.* 4, *c.* 29, *s.* 53, (*ante*, *p.* 289), the defendant may be convicted, although it appear at the trial that the offence amounts to larceny, and not merely to obtaining money, &c, by false pretences. The safer course, therefore, to adopt, where it is doubtful whether the offence is larceny or obtaining goods under a false pretence, is to indict for the misdemeanor; in which case, if the offence should turn out to be larceny, the prisoner may nevertheless be convicted by force of the statute. These two offences are sometimes difficult to be distinguished, in cases where there has been a constructive taking; (*see ante*, *p.* 182); but the difficulties arising from this circumstance appear to be obviated by the statute.

Lastly, it must be proved that the pretences made use of were false in fact; or, in other words, the averments negativing the pretences must be proved. But it does not seem to be essential that they should all be proved; if so many of them as shew the falsity of the substance of the pretence be proved, it should seem to be sufficient. As, in the present instance, if it were to appear in evidence that the defendant was really the servant of K. O., yet if it were also to appear that he had no directions from him to get the cloth in question, and that, after he had obtained it, he converted it to his own use, it would be sufficient. Where the defendants were charged with obtaining money by colour and pretence of their being collectors of the property tax, and it appeared in evidence that they had in fact been appointed collectors by the commissioners, though in an informal manner; this was holden not to be a *false* pretence within the meaning of the act. *R.* v. *Dobson*, 7 *East*, 218.

### *Indictment for selling by false Scales.*

Middlesex, to wit:—The jurors of our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., [*grocer*], on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, and from thence until the taking of this inquisition, did use and exercise the trade and business of a [*grocer*], and during that time did deal in the buying and selling by weight of [*teas, sugars, spices*] and of divers other goods, wares, and merchandizes, to wit, at the parish aforesaid, in the county aforesaid; and that the said J. S., being a person of a wicked and depraved mind, and contriving and fraudulently intending to cheat and defraud the subjects of our said lady the Queen, whilst he was and continued to be a [*grocer*] as aforesaid, to wit, on the said third day of August, in the year last aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, knowingly, wilfully, falsely, fraudulently, and deceitfully, did keep in a certain shop there situate, wherein he the said J. S. did so as aforesaid carry on his said trade, a certain false pair of scales for the weighing of goods, wares, and merchandizes by him sold in the way of his said trade, and which said scales were then and there, by artful and deceitful means and contrivance, so made and constructed as to cause the goods, wares, and merchandizes weighed and sold thereby to appear of greater weight, to wit, of a greater weight by two ounces in every quantity of goods weighed thereby, than the real and true weight thereof; and that the said J. S., well knowing the said scales to be false as aforesaid, did then and there, to wit, on the several days and times aforesaid, at the parish aforesaid, in the county aforesaid, wilfully, falsely, fraudulently, and deceitfully sell and utter to divers subjects of our lady the Queen, divers goods, wares, and merchandizes, in the way of his said trade, weighed in and sold by the said false scales; and which goods, wares, and merchandizes were then and there very much deficient and short of the weight at and for which the same were so sold by the said J. S. as aforesaid, to wit, by the weight of two ounces; to the great damage and deceit of her Majesty's said subjects, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *If you can prove any particular instance of a sale by those scales to a particular person, you may add a count upon it; or, if you think your evidence not sufficiently specific to maintain the count above given, you may add a count or counts in a more general form. See 6 Went. 389. Stating the sale to have been to "divers subjects to the jurors unknown," has been holden sufficient. R. v. Gibbs, 1 Str. 497. An indictment for selling by false weights or measures may readily be framed from the above precedent.*

*For other frauds at common law, see 2 Russ. 275—286.*

*This is a misdemeanor at common law, punishable by fine or imprisonment, or both.*

### *Evidence.*

Prove that the defendant carried on the business mentioned in the indictment; that the false scales described in the indictment were found in his shop or warehouse, &c.; and that he has used them in

weighing goods sold by him to his customers. If you have proof that the scales were used by his shopmen or servants, it will be sufficient, as it will be presumed that they were used by his orders.



SECT. 4.

BURGLARY.



*Statutes.*

7 & 8 *G.* 4, *c.* 29, *s.* 11]—Enacts, that every person convicted of burglary shall suffer death as a felon; and it is hereby declared that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house, shall commit any felony, and shall in either case break out of the said dwelling-house, in the night-time, such person shall be deemed guilty of burglary.

Sect. 13]—(*Ante, p.* 238).

7 *W.* 4 & 1 *Vict. c.* 86, *s.* 2—*Burglary attended with Violence*]—Enacts, that whosoever shall burglariously break and enter into any dwelling-house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike any such person, shall be guilty of felony, and being convicted thereof, shall suffer death.

Sect. 3—*Punishment of Burglary*]—Enacts, that whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than ten years, or to be imprisoned for any term not exceeding three years.

Sect. 4—*Definition of the* Night *for the Purpose of Burglary*]—Enacts, that so far as the same is essential to the offence of burglary, the night shall be considered and is hereby declared to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.

Sect. 7—*Place and Mode of Imprisonment*]—(*Ante, p.* 239).



*Indictment for Burglary and Larceny.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, about the hour of eleven in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of one J. N., there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of one K. O., in the said dwelling-house, then and there

being, then and there feloniously and burglariously to steal, take, and carry away;* and then and there in the said dwelling-house, one silver sugar bason of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, of the goods and chattels of the said K. O., in the said dwelling-house then and there being found, then and there feloniously and burglariously did steal, take, and carry away; against the peace of our lady the Queen, her crown and dignity.

*If bank-notes, or other valuable securities, be stolen, conclude* "against the form of the statute," &c.; *for although this is not necessary as to the burglary, yet if that part of the charge fail, such a conclusion would be deemed to be necessary in order to convict for the larceny. R.* v. *Pearson,* 5 *C. & P.* 121. *But otherwise the indictment need not conclude contra formam statuti. Reg.* v. *Polly,* 1 *C. & K.* 77. *If there be any doubt as to the ownership of the house or goods, you may add other counts accordingly. It seems, however, that no ownership of the* goods *need be stated. Reg.* v. *Clarke,* 1 *C. & K.* 421. *Also, as burglary is a breaking and entering of a dwelling-house, with intent to commit a felony, (and whether a felony at common law or by statute is immaterial,* 1 *Hawk. c.* 38, *s.* 38), *if there be any doubt of the intent with which the offence was committed, it may be varied in different counts accordingly. The intent to steal, as well as the stealing, ought to be charged;* 1 *Hale, P. C.* 559; *but where an indictment for burglariously breaking and entering a dwelling-house, and then and there stealing goods therein, omitted to state the intent, it was holden that the defendant might be convicted of the burglary, if the larceny were proved, but not otherwise. R.* v. *Furnival, R. & R.* 445.

*Felony, transportation for life or not less than ten years, or imprisonment not exceeding three years;* 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 3; *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 7; *(ante, p.* 239).

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, *(ante, p.* 69).

### *Evidence.*

Burglary, at common law, is the breaking and entering the dwelling-house of another in the night-time, with intent to commit a felony therein; 4 *Bl. Com.* 224; 3 *Inst.* 63; and by stat. 7 *&* 8 *G.* 4, *c.* 29, *s.* 11, the breaking out of the dwelling-house of another in the night-time, having entered it with intent to commit felony, or having committed a felony while in it, is also declared to be burglary. In order to maintain the above indictment, the prosecutor must prove that the defendant broke and entered the dwelling-house of J. N., in the night-time, with an intent to steal the goods of K. O.; and whether he succeed or fail in this, he may proceed to prove a larceny of the goods of K. O. from the dwelling-house of J. N., in the manner directed *ante, p.* 240; and if he succeed in proving the larceny, but fail in proving it to have been committed in the dwelling-house of J. N., the defendant may be convicted of the simple larceny.

Having made these few general observations, we shall now proceed to state the evidence in burglary more particularly.

*About the Hour of Eleven in the Night.*]—Before the recent stat.

7 *W.* 4 & 1 *Vict. c.* 86, *s.* 4, which declares, that for the purpose of burglary, the night shall be considered to commence at 9 P. M., and to conclude at 6 A. M., of the next day, many nice questions arose as to what fell within the meaning of *the night-time;* and it is still necessary to refer shortly to the authorities on this subject, as cases may arise where the offence was committed before that act came into operation. With reference to this subject, the day may be divided into three parts: daylight, twilight, and night. If the breaking and entering were in the night, it was burglary; if in daylight it was not. If it were committed during twilight, then, if there were not daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was burglary; otherwise not. 3 *Inst.* 63; 1 *Hale*, 550; 1 *Hawk. c.* 38, *s.* 2; 4 *Bl. Com.* 224. But this did not extend to moonlight; for then many midnight burglaries would go unpunished. 4 *Bl. Com.* 224; 1 *Hale*, 551.

The breaking and entering must both be committed in the night-time; if the breaking be in the day, and the entering in the night, or the breaking in the night, and entering in the day, it is no burglary. 1 *Hale*, 551. But the breaking may be on one night, and the entry on another, 1 *Hale*, 551, provided the breaking be with intent to enter, and the entry with intent to commit a felony. *R.* v. *Smith*, *R.* & *R.* 417: *see R.* v. *Jordan*, 7 *C.* & *P.* 432.

*The Dwelling-house of J. N.*]—To prove this allegation, the prosecutor must prove that the defendant broke and entered the dwelling-house of J. N., in which he was in the habit of residing; 3 *Inst.* 64; or some building between which and the dwelling-house there was a communication, either immediate, or by means of a covered and inclosed passage leading from the one to the other. 7 & 8 *G.* 4, *c.* 29, *s.* 13, (*ante, p.* 238). And evidence of a breaking and entering of such a building will sustain an indictment charging a breaking and entry of the dwelling-house. *R.* v. *Garland*, 1 *Leach*, 144; 1 *East*, *P. C.* 493, 572.

Every permanent building, in which the renter or owner and his family dwell and lie, is deemed a dwelling-house, and burglary may be committed in it. Even a set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose. 1 *Hale*, 556. 3 *Inst.* 65: *see Monks* v. *Dykes*, 4 *M.* & *W.* 565; *Fenn* v. *Grafton*, 2 *Bing. N. C.* 617; 2 *Scott*, 56. And it will be sufficient if any part of his family lie in the house. Thus, where a servant boy of the prosecutor always slept over a brewhouse of the prosecutor's, which was separated from his dwelling-house by a public passage, but occupied therewith, it was holden, upon an in-indictment for burglary, that the brewhouse was the dwelling-house of the prosecutor, although, being separated by the passage, it could not be deemed to be a part of the house in which he himself actually dwelt. *R.* v. *Westwood*, *R.* & *R.* 495. So where, upon an indictment for burglary in a shop, it appeared that the prosecutor had left his house without an intention of returning, and had let some of the rooms to lodgers, but continued his business there, and his apprentice and foreman and the foreman's wife, who was also his servant, employed in keeping the apartments clean, dwelt there, but received weekly wages, it was holden to be the dwelling-house of the prosecutor. *R.* v. *Gibbons*, *R.* & *R.* 442. And where a counting-house, over which there were two rooms communi-

cating by a trap-door, which was never used, was broken open, and it appeared that the prosecutor's cooper and his family lived in the two rooms, upon a contract that they should have the rooms to live in and firing, and weekly wages, it was holden that the counting-house was the dwelling-house of the prosecutor. *R.* v. *Stock, R. & R.* 185. The mere temporary absence of the owner and his family will not deprive the house of this protection the law gives it: as, for instance, if a man have a town and country house, in which he resides alternately, and whilst he and his family are residing for the season in the country house, the town house is broken and entered; 1 *Hale,* 556; or, if a man lock up his house and go a journey, and, during his absence, it be broken and entered; *R.* v. *Murray,* 2 *East, P. C.* 496; *Fost.* 77, *cit.;* or if a barrister have a set of chambers, in which he resides during the term only, and during the vacation they be broken and entered; 1 *Hale,* 556; in these and the like cases the houses and set of chambers respectively, even although no person actually resided in them at the time, must be deemed dwelling-houses, and the breaking and entering of them burglary; provided it appear that the owners, when they left them, had an intention to return to them. 1 *Hale,* 522, 556; *Fost.* 77; *R.* v. *Nutbrown, Fost.* 76. But burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it; 1 *Hawk. c.* 38, *s.* 35; 1 *Hale,* 557; because it is a temporary, not a permanent edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling-house. *R.* v. *Smith,* 1 *M. & Rob.* 256. Breaking open a house, in which no man resides or is in the habit of residing, is no burglary, even though the owner use it for his meals and the purposes of his business; for it is not a dwelling-house. *R.* v. *Martin, R. & R.* 108. If a porter lie in a warehouse, for the purpose of protecting goods, *R.* v. *Smith,* 2 *East, P. C.* 497, or a servant lie in a barn in order to watch thieves, *R.* v. *Brown,* 2 *East, P. C.* 502, this does not make the warehouse or barn a dwelling-house, in which burglary can be committed. So, where the landlord of a dwelling-house, after the tenant had quitted it, put a servant into it, to sleep there at night, until he should relet it to another tenant, but had no intention to reside in it himself: the judges held that this could not be deemed the dwelling-house of the landlord. *R.* v. *Davies,* 2 *Leach,* 876. And where the prosecutor left his house without an intention of returning to live in it, but retained it as a workshop and warehouse, and two women employed in his business, not as domestic servants, slept in the house merely for the purpose of taking care of it, but did not take their meals there, or use the house for any other purpose, it was holden not to be the dwelling-house of the prosecutor. *R.* v. *Flannagan, R. & R.* 187. So, where the tenant had put all his goods and furniture into the house, preparatory to his removing to it with his family, but neither he nor any of his family had as yet slept in it: it was holden not to be a dwelling-house in which burglary could be committed. *R.* v. *Hallard,* 2 *East, P. C.* 498: *R.* v. *Thompson, Ib.;* 2 *Leach,* 771. And the same has been ruled, where, under such circumstances, the tenant had put a person (not being one of the family) into the house, for the protection of the goods and furniture in it, until it should be ready for his residence. *R.* v. *Harris,* 2 *Leach,* 701: *R.* v. *Fuller,* 2 *East, P. C.* 498; 1 *Leach,* 187. *See R.* v. *Jones,* 2 *East,* 499: *R.* v. *Flannagan, R. & R.* 187.

A dwelling-house may be divided so as to form two or more dwell-

ing-houses, (within the meaning of the word in the definition of burglary), by letting a part of it to a tenant; provided there be no internal communication between the part so let and the remainder of the dwelling-house. Upon an indictment for burglary, it appeared that the house in which the burglary was alleged to have been committed formed the centre of a building, having two wings; in one of which A. lived, and the other consisted of the dwelling-houses of B. and C. respectively; the centre consisted of three manufactories, in one of which A., B., D., and other persons, were jointly concerned, and of the remaining two, D. was the sole proprietor. C. was merely in the employment of D. There was no internal communication between the centre building and the houses of A. and B., nor between it and the house of C., excepting a window in the house of C., which looked into a passage that ran the whole length of the centre building. One of the counts in the indictment alleged the centre building to be the dwelling-house of C.: but the judges held that the window merely was not such an internal communication as could make the centre building be deemed parcel of C.'s house. *R.* v. *Eggington*, 2 *B. & P.* 508. Where a part of a dwelling-house, however, is severed by letting, it thereby becomes (considered as a distinct house) the subject of burglary or not, according to circumstances. If a man hire a shop, parcel of another man's house, and unconnected with it by internal communication; and the tenant work or trade in it, but never lie there: it is no dwelling-house, and burglary cannot be committed in it. 1 *Hale*, 558. If, on the contrary, he or any part of his family lie there, it is deemed his dwelling-house, and may be laid to be so in an indictment for burglary. *Ib.; and see R.* v. *Rogers*, 1 *Leach*, 89, 428. So, if he let off part, and do not by himself or any of his family dwell in the other part, the part let off is the dwelling-house of the tenant, whether it communicate with the other part or not, but the part not let off is not the subject of burglary. But if the owner of the dwelling-house let the shop, which is unconnected by internal communication with the house, and also let some rooms in the house, which are connected with the other parts of it, to the same person; and the tenant or some of his family sleep in the rooms; a breaking and entering of the shop, in that case, will be burglary, and it may be laid to be committed in the dwelling-house of the landlord. *R.* v. *Gibson*, 1 *Leach*, 357; 2 *East, P. C.* 508. *See Lee* v. *Gansel*, *Cowp.* 8: *R.* v. *Stock*, *R. & R.* 185; 2 *Leach*, 1015: *R.* v. *Inhabitants of North Collingham*, 1 *B. & C.* 578: *R.* v. *Inhabitants of Great Bolton*, 8 *B. & C.* 71: *R.* v. *Inhabitants of Ditcheat*, 9 *B. & C.* 176: *R.* v. *Inhabitants of Macclesfield*, 2 *B. & Adol.* 870; *Fenn* v. *Grafton*, 2 *Bing. N. C.* 617; 2 *Scott*, 56.

The term "dwelling-house" includes in its legal signification all outhouses occupied with and immediately communicating with the dwelling-house. But by stat. 7 & 8 *G.* 4, *c.* 29, *s.* 13, (*ante, p.* 238), no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other. Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a wash-house on the ground-floor, and of three bed-rooms up stairs, one of them over

the wash-house, and the bed-room over the house-place communicated with that over the wash-house, but there was no internal communication between the wash-house and any of the rooms of the house, but the whole was under the same roof; and the defendant broke into the wash-house, and was breaking through the partition wall between the wash-house and the house-place; it was holden, that the defendant was properly convicted of burglary in breaking the house. *R.* v. *Burrows*, 1 *Mood. C. C.* 274. To be within the meaning of this section, the building must be occupied with the house in the same right; and therefore, where a house let to and occupied by A., adjoined and communicated with a building let to and occupied by A. and B., it was holden, that the building could not be considered a part of the dwelling-house of A. *R.* v. *Jenkins*, *R. & R.* 224. If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage. (*Ante, p.* 243).

As to the ownership of the dwelling-house:—Where it is laid to be the dwelling-house of J. N., proof that it was occupied by his wife and her establishment alone will support the indictment: and in such a case, it should always be alleged in the indictment to be the dwelling-house of the husband, even although the wife live separate from him, and the house have been taken by her, and she have paid the rent, taxes, &c. *R.* v. *Farre, Kel.* 43: *and see Boggett* v. *Frier*, 11 *East*, 301: *R.* v. *Smith*, 5 *C. & P.* 202. Thus, where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use, the judges held, that a house which she had lived in was properly described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. *R.* v. *French*, *R. & R.* 491. And where a husband and wife separated by mutual consent, and the wife lived in a house belonging to the husband, with his consent, and with the knowledge of her husband in adultery with another man, who paid the household expenses but not the rent, it was holden that the house was properly described as the dwelling-house of the husband. *R.* v. *Wilford*, *R. & R.* 517. So, if a man occupy a dwelling-house by his servants, and do not reside in it himself, the indictment must allege it to be the dwelling-house of the master, and evidence of an occupation by his servants will maintain the indictment. (*See ante, p.* 299). But a difficulty very frequently arises in such case, to ascertain whether the occupation by the servant is in his own right or in that of his master. Where three persons were in partnership in a bank and brewhouse, the business of which was transacted in the lower rooms of the house in question, and a cooper in the service of the partnership, at weekly wages, lived with his family in the upper rooms, which communicated with the lower rooms by means of a trap-door and a ladder, but there was also a separate entrance to these rooms from without; the lower rooms were broken and entered, and property stolen from them: and the judges held that the house was well laid in the indictment to be the dwelling-house of the partners. *R.* v. *Stock*, 2 *Taunt.* 339; 2 *Leach*, 1015; *R. & R.* 185. Where a warehouseman with his family lived in a dwelling-house upon his master's premises, for which and for coals he paid his master a rent of 11*l.* a year, and the master let the house, which was worth 20*l.* *per annum* to an ordi-

nary tenant, to the warehouseman at the lower rent, that he might reside upon the premises as a security, it was holden that the warehouseman stood in the character of tenant, for the master might have distrained upon him for rent, and could not arbitrarily have removed him. *R.* v. *Jarvis*, 1 *Mood. C. C.* 7. *See R.* v. *Smith*, 5 *C. & P.* 202. So, where with certain wages, a labourer had a cottage rent-free to live in, it was holden, that as the labourer occupied this cottage for his own benefit, and not for the benefit of his master, it was well described as the dwelling-house of the labourer. *R.* v. *Jobling*, *R. & R.* 525. Where a toll-gate house, occupied by a person employed by the lessee of the tolls to collect the tolls, at weekly wages, with the privilege of living in the toll-gate house erected by the trustees of the road for that purpose, was broken and entered in the night-time, it was holden that the house was well described as the dwelling-house of the toll-gate keeper, because he had the exclusive possession, and it was unconnected with the premises of the lessee, who did not appear to have any interest in it. *R.* v. *Canfield*, 1 *Mood. C. C.* 42. So, where a gardener lived in a house of his master, quite separate from the dwelling-house of his master, and had the entire control of the house he lived in, and kept the key, it was held that it might be laid either as his or his master's house. *R.* v. *Rees*, 7 *C. & P.* 568. And where a servant lived rent-free in a house belonging to his master, and his master paid the taxes, and his master's business was carried on in the house; but the servant and his family were the only persons who slept in the house; and that part of the house in which his master's business was carried on, was at all times open to those parts in which the servant lived; upon an indictment for breaking and entering that part of the house in which the master's business was carried on, it was held that, it might be described as the servant's house; but it was not decided that it might not also be described as the house of the master. *R.* v. *Witt*, 1 *Mood. C. C.* 248. Where the house was described as the house of J. B., and it appeared that J. B. worked for one W. who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and of some mills adjoining, J. B. receiving no more wages than before he went to live in the house; it was held not rightly laid. *R.* v. *Rawlings*, 7 *C. & P.* 150. Where apartments in the house of a corporation are appropriated as lodgings for servants of the corporation a burglary committed in them must be laid to have been committed in the dwelling-house of the corporation. *R.* v. *Picket*, 2 *East*, *P. C.* 501: *R.* v. *Hawkins*, *Fost.* 38: *and see R.* v. *Maynard*, 2 *East*, *P. C.* 501. So, a club-house cannot be laid as being the dwelling-house of the house-steward, who sleeps in it, and had charge of the property stolen. *Reg.* v. *Ashley*, 1 *C. & K.* 198. So, where apartments are assigned to any person in a royal palace, a burglary committed in them must be laid to have been committed in the mansion of the Queen. *R.* v. *Williams*, 1 *Hale*, 522: *and see Kel.* 27; 1 *Leach*, 324. But where a company in the country rented a house in London for their agent, in the upper part of which he resided with his family, and in the lower part transacted his business, it is reported to have been holden by *Graham*, B., and *Grose*, J., that a burglary in the house was well laid to have been committed in the dwelling-house of the agent. *R.* v. *Margette*, 2 *Leach*, 930. Where a house rented by A. and B.,

partners, was divided into two houses for the convenience of their respective families, the family of A. residing in one, the family of B. in the other, and there was no internal communication between them: a burglary in the part occupied by A. was holden to be well laid to have been committed in the dwelling-house of A., and not of the partners, although the rent of both houses was paid jointly out of the partnership funds. *R.* v. *Jones*, 1 *Leach*, 537. But a house, the joint property of partners in trade, in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of the partners resides in it. *R.* v. *Athea*, 1 *Mood. C. C.* 329.

Where the room occupied by a guest in an inn is broken and entered in the night-time, an indictment for the burglary must lay it to have been committed in the dwelling-house of the inn-keeper; 1 *Hale*, 557: *R.* v. *Prosser*, 2 *East*, 502; and the same in all other cases where the occupier has the use merely, and no interest in the apartments he occupies. *See* 1 *Hawk. c.* 38, *s.* 26. Apartments let to lodgers, however, admit of a different consideration. If part of a house be let to a lodger, who sleeps there, and no other person resides in the remainder of the house, a burglary in the lodgings must be laid to have been committed in the dwelling-house of the lodger. Where a coachman rented the loft over a coach-house and stables, and he and his family resided in it, a burglary committed in it was holden to be well laid to have been committed in the dwelling-house of the coachman. *R.* v. *Turner*, 1 *Leach*, 305. So, if the house be let out to several lodgers, and the owner do not reside in it, a burglary in it must be alleged to have been committed in the dwelling-house of that person whose lodgings were broken and entered. *R.* v. *Rogers*, 1 *Leach*, 89; *and see R.* v. *Trapshaw*, 1 *Leach*, 427. So, where the shop of a dwelling-house is divided into two shops, with a door in each opening towards the street, and another into a common passage leading to the common staircase, and the whole of the house is occupied by the two occupiers of the shops, the separate shop of each may be described as the dwelling-house of each. *R.* v. *Bailey*, 1 *Mood. C. C.* 23. And where a lodger occupied a sleeping room on the first floor, and the workshop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the workshop was holden by the judges to be well laid to have been committed in the dwelling-house of the lodger who rented it. *R.* v. *Carrol*, 1 *Leach*, 287. But if the owner of the house reside in a part of it, and let the rest out in lodgings—then, if the part occupied by the lodger be severed from that occupied by the owner, that is, if there be no internal communication between them, and the lodger and owner enter the house by different outer-doors, a burglary in the part occupied by each respectively must be laid to have been committed in the dwelling-house of the person so occupying it; but if they be not severed, and the lodger and owner enter by the same outer-door, then the burglary must be laid to have been committed in the dwelling-house of the owner. 1 *Leach*, 90, *n.*; *Kel.* 83, 84; 2 *East*, *P. C.* 503. Where, therefore, the servant of the prosecutor dwelt in part of the house, and the rest, excepting the shop, was let off to lodgers; it was holden, that the shop in the prosecutor's occupation was properly described as the dwelling-house of the prosecutor. *R.* v. *Gibbons*, *R.* & *R.* 442. And where the prosecutor let a shop to his son, which had a separate entrance from the street,

but communicated with the dwelling-house of the prosecutor by a back door, and the son used the shop as a place of business only, and did not reside there, it was holden that the shop was properly described as the dwelling-house of the prosecutor. *R.* v. *Sefton*, *R.* & *R.* 202. If a person let off part of his house, but do not dwell in the part reserved, the part let is the dwelling-house of the tenant, but the part reserved is not the subject of burglary; it is not the dwelling-house of the tenant, because it forms no part of his holding, and it is not that of the owner, because he does not dwell in it. The governor of a workhouse under a contract for seven years with the guardians and overseers of the poor, occupied and dwelt in the governor's house, with the exception of one room reserved to the guardians and overseers, as their office, of which the governor had one key, and the clerk of the guardians and overseers the other, but the governor's servant cleaned the room; upon an indictment for breaking and entering this room, it was holden, that it could not be described as the dwelling-house of the governor. *R.* v. *Wilson*, *R.* & *R.* 115. (*See ante*, *p.* 301).

In all cases of this description, if there be any the slightest doubt whether the house broken and entered should be described as the dwelling-house of A., B., or C., the pleader should obviate the difficulty by inserting counts alleging it to be the dwelling-house of A., B., and C., respectively.

It may be necessary to mention, that a man cannot be indicted for burglary in his own house. Therefore, if the owner of a house break and enter the room of his lodger, and steal his goods, he can only be convicted of the larceny. *Kel.* 84; 2 *East*, *P. C.* 502, 506.

It may also be necessary to mention, that a church may be the subject of burglary; 3 *Inst.* 64; 1 *Hale*, 556; but this is now provided for by statute. (*See ante*, *p.* 236).

And lastly, as to the local description of the house:—it must be proved strictly as laid; if there be the slightest variance between the indictment and evidence, in the parish, &c., where the house is alleged to be situate, the defendant must be acquitted of the burglary. (*Ante*, *p.* 41.) If it be not stated in the indictment where the house is situate, it shall be taken to be situated at the place laid as special venue. *R* v. *Napper*, 1 *Mood. C. C.* 44. And if, two parishes having been named, the house is stated to be "at the parish aforesaid," the last parish shall be intended. *R.* v. *Richards*, 1 *M.* & *Rob.* 177. It is sufficient to allege that the burglary was committed at a *place* named (as "at N., in the county aforesaid") without stating it to be a parish, vill, chapelry, or the like. *Reg.* v. *Brookes*, *C.* & *Mar.* 544. In *R.* v. *Bennett*, *R.* & *R.* 289, it appeared, upon an indictment for breaking and entering a dwelling-house in the parish of A., that the out-house broken and entered was in the parish of B., but the dwelling-house with which it was connected and occupied was in the parish of A., and the point was raised, but not decided, whether under such circumstances the indictment was satisfied.

To avoid difficulty, different counts should be inserted, varying the local description. If the house be not proved to be a dwelling-house, *vide supra*, and to be the dwelling-house of J. N., (*see ante*, *p.* 36), *R.* v. *White*, 1 *Leach*, 252, the defendant must be acquitted of the burglary.

*Break.*]—There must be a breaking of the house, either actual or

constructive, to constitute burglary. If a man leave his doors or windows open, and another enter therein with intent to commit a felony, it is no burglary. 1 *Hale*, 551; 3 *Inst.* 64. So, if there be an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary. *R.* v. *Lewis*, 2 *C. & P.* 628: *R.* v. *Spriggs*, 1 *M. & Rob.* 357.

An actual breaking is, where the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of the house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting the latch, or unlooses any other fastening to doors or windows which the owner has provided. 3 *Inst.* 64; 1 *Hale*, 552. Thus, where an entry was effected by taking out the glass from a door, it was holden to be burglary. *R.* v. *Smith*, *R. & R.* 417. And where the defendant pulled down the sash of a window which had no fastening, and was only kept in its place by the pulley weight, it was holden to be burglary, although there was an outer shutter which was not put to. *R.* v. *Haines*, *R. & R.* 451. So, where he raised a sash window which was shut down close, but not fastened, though it had a hasp which might have been fastened. *R.* v. *Hyams*, 7 *C. & P.* 441. And where a window opening upon hinges, and fastened with wedges, but so that by pushing against it it could be opened, was opened; it was holden to be burglary. *R.* v. *Hall*, *R. & R.* 355. So, where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and thus got at and removed the fastening of the window and opened it, it was holden to be a sufficient breaking. *R.* v. *Robinson*, 1 *Mood. C. C.* 327. In *R.* v. *Callan*, *R. & R.* 157, the prisoner entered the premises by lifting up a heavy flap of a cellar, which was not bolted, and upon a question reserved whether this was a sufficient breaking to constitute burglary, the judges were equally divided: in a later case, however, it has been decided that lifting up the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purpose of burglary. *R.* v. *Russell*, 1 *Mood. C. C.* 377. *See R.* v. *Brown*, 2 *East*, *P. C.* 487. If a window be partly open, but not sufficiently to admit a person, the raising of it so as to admit a person is not a breaking of the house. *R.* v. *Smith*, 1 *Mood. C. C.* 178.

A constructive breaking is, where the offender, with intent to commit a felony, obtains admission by some artifice or trick, for the purpose of effecting it. As, for instance, if a man knock at a door, and, upon its being opened, rush in with a felonious intent; or upon pretence of taking lodgings, fall upon the landlord and rob him; or procure a constable to gain admittance, in order to search for traitors, and then bind the constable and rob the house; all these entries have been adjudged burglaries, although there were no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. 1 *Hawk. c.* 38, *ss.* 9, 10; 4 *Bl. Com.* 226. So, where the defendant obtained admission, by promising a boy, who was in care of the house, some ale; and whilst the boy was gone for the ale, robbed the house: this was holden to be burglary. *R.* v. *Hawkins*, 2 *East*, *P. C.* 485. Nay, if a servant conspire with a robber, and let him into the house by night, this is burglary in both; 1 *Hale*, 553; 1 *Hawk. c.* 38, *s.* 14: *R.* v. *Cornwall*,

2 *Str.* 881; for the servant is doing an unlawful act; and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting, and apprehending him, this is no burglary, for the door is lawfully open. *Reg.* v. *Johnson*, *C. & Mar.* 218. Obtaining admission to a house by getting down the chimney, is burglary; for the chimney is as much closed as the nature of things will admit. *R.* v. *Brice*, *R. & R.* 450; 1 *Hawk. c.* 38, *s.* 6. *See* 1 *Hale*, 552.

And the breaking necessary to constitute burglary is not restricted to a breaking of the outer wall, or doors, or windows of a house; if the thief get admission into the house by the outer-door or window being open, and afterwards breaks or unlocks, &c., an inner-door, for the purpose of entering one of the rooms, &c., in the house, it is burglary. 1 *Hale*, 553: *R.* v. *Johnson*, 2 *East*, *P. C.* 488. So, if a servant open his master's chamber door, or the door of any other chamber not immediately within his trust, with a felonious design; or if any other person lodging in the same house, or in a public inn, open and enter another's door, with such evil intent, it is burglary. 1 *Hale*, 553, 554. It is doubted, whether breaking open cupboards, &c., in the inside of a house, affixed to the freehold, is burglary; *see* 1 *Hale*, 527; *Fost.* 108; and Mr. Justice *Foster*, *in favorem vitæ*, recommends that it should not be so considered. *Fost.* 109. And clearly, the breaking open chests, &c., in a dwelling-house, is not burglary. 1 *Hale*, 553, 554. The breaking must be of some part of the house; and therefore, where the defendant opened an area gate with a skeleton key, and thence passed through an open door into the kitchen, it was holden not to be a breaking, there being no free passage from the area to the house in the hours of sleep. *R.* v. *Davis*, *R. & R.* 322. And upon the same principle, it was holden that the breaking of an outward gate, part of the outward fence of the curtilage of a dwelling-house, and which opened, not into any building, but into the yard only, was not a breaking of the dwelling-house. *R.* v. *Bennett*, *R. & R.* 289. Where a shutter-box partly projected from a house, and adjoined the side of the shop window, which side was protected by wooden pannelling, lined with iron: it was holden that the breaking and entering the shutter-box did not constitute burglary. *R.* v. *Paine*, 7 *C. & P.* 135.

*To enter.*]—And there must be an entry, as well as a breaking, to constitute burglary; although we have seen that the entry need not be on the same night of the breaking. *Ante*, *p.* 303: 1 *Hale*, 551. Any the least degree of entry, however, with any part of the body, or with any instrument held in the hand, is sufficient; as for instance, after breaking the door or window, &c., to step over the threshold, to put a hand, a finger, *R.* v. *Davis*, *R. & R.* 499, or a hook or other instrument in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. 1 *Hale*, 555; *Fost.* 108; 1 *Hawk. c.* 38, *ss.* 11, 12; 3 *Inst.* 64. So, if the defendant introduce his hand through a pane of glass, broken by him, between the outer window and an inner shutter, for the purpose of undoing the window latch, it is a sufficient entry. *R.* v. *Bailey*, *R. & R.* 341. So, an entry down a chimney is a sufficient entry into the house, for the chimney is part of the house. *R.* v. *Brice*, *R. & R.* 450. But

an entry through a hole in the roof left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening, and needs protection; whereas if a man choose to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *R.* v. *Spriggs*, 1 *M. & Rob.* 357. It has even been said, that discharging a loaded gun into a house is a sufficient entry. 1 *Hawk. c.* 38, *s.* 11. But there must be an entry: if, for instance, a man assault a house, or even break a hole in it, and before entry the owner fling his money to the thief, it would not be burglary. 1 *Hawk. c.* 38, *s.* 3; 1 *Hale*, 555. So, if the instrument with which the house is broken happen to enter the house, but without any intention upon the part of the burglar to effect his felonious intent (as, for instance, to draw out the goods) with it, this will not be a sufficient entry to constitute a burglary. *R.* v. *Hughes*, 1 *Leach*, 406. *See R.* v. *Roberts*, 2 *East, P. C.* 487. Where, therefore, the defendant threw up a window, and introduced a crow-bar to force the shutters, which were three inches from the window, but no part of his hand was within the window, this was holden not to be an entry, although the jury found that the defendant did this with intent to steal. *R.* v. *Rust*, 1 *Mood. C. C.* 183.

*With intent, &c.*]—The intent laid in the indictment must be, to commit some felony (and whether a felony at common law or by a statute is immaterial, 1 *Hawk. c.* 38, *s.* 38), in the dwelling-house, such as larceny, murder, rape, &c.; and the intent must be proved as laid. Where the intent laid was to kill a horse, and the intent proved was merely to lame him, in order to prevent him from running a race, the variance was holden fatal. *R.* v. *Dobbs*, 2 *East, P. C.* 513. If the intent laid be to murder, and the intent proved be to beat the party merely, the variance is fatal. 1 *Hale*, 561. Where the intent laid was to steal, and the intent was proved to carry away the defendant's trunk containing money which he had formerly embezzled from his master, it was holden that the offence proved did not amount to a burglary; for it was no felony in the defendant to remove the money. *R.* v. *Dingley*, 2 *Leach* 840, *c.* So, where the intent was laid to steal, and the intent proved was to rescue uncustomed goods which had been seized, the judges held that the indictment was not sustained by the evidence. *R.* v. *Knight*, 2 *East, P. C.* 510. So, where the intent laid was to steal the goods of J. W., and it appeared in evidence that no goods of any person of the name of J. W were in the house, but that the name of J. W. had been inserted in the indictment by mistake; the judges held the variance to be fatal, and the defendant was accordingly acquitted. *R.* v. *Jenks*, 2 *East, P. C.* 514; (*ante, p.* 100). But where the indictment alleged the intent to be generally "the goods and chattels in the said dwelling-house then and there being" to steal, and charged the defendant with stealing the goods of A. therein, it was held to be satisfied by proof of a breaking into the house, with intent to steal the goods there generally, though the goods actually stolen did not belong to A. alone. *Reg.* v. *Clarke*, 1 *C. & K.* 421.

The best evidence of the intent is, that the defendant actually committed the felony alleged to have been intended by him: *see R.* v. *Locost, Kel.* 30: or you may give in evidence any other facts from which the intent may be presumed by the jury. (*See ante, p.* 104). Where the defendant was discovered in the chimney of a shop in the

night-time, and the jury found him guilty of the burglary with intent to steal, it was holden that the evidence was sufficient to warrant the conviction. *R.* v. *Brice*, *R.* & *R.* 450. If the intent be at all doubtful, you may lay it different ways in separate *counts*. *See* 2 *East, P. C.* 515; 2 *Leach*, 1105, (*n*).

The burglariously breaking and entering a house with intent to commit a rape therein, is not a crime which includes an assault, and therefore on an indictment for such a burglary, the defendant cannot be convicted of an assault under the stat. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante*, *p.* 253). *Reg.* v. *Watkins*, *C.* & *Mar.* 264; 2 *Mood. C. C.* 217.

*And then and there in the said Dwelling-house, &c.*]—The larceny in the dwelling-house is proved as directed *ante*, *p.* 240. It seems, however, that, to convict the defendant of the felony charged to have been committed, it must appear to have been concurrent with the burglary; you cannot give evidence of a felony committed at a different time. Where it appeared in evidence, that upon entering the house at three o'clock in the day, the owner found that some person had removed certain goods to a different part of the house from that in which he had placed them, seemingly for the purpose of stealing them: and the defendants afterwards, on the same evening, having broken and entered the house, were taken in it, before they had attempted to move or carry away any thing: having failed at the trial to prove the burglary, the prosecutor was proceeding to prove the defendants guilty of the antecedent larceny; but the court refused to receive the evidence, saying, that the transactions were perfectly distinct, and that the prosecutor might as well attempt to prove a larceny committed seven years before. *R.* v. *Vandercomb* & *Abbott*, 2 *Leach*, 708.

If you succeed in proving a larceny, but fail in proving it to have been committed in the dwelling-house, or the goods to be of the value of five pounds, and if you also fail in proving the burglary, the defendant may be convicted of the simple larceny. If two or more are indicted, one may be found guilty of the burglary and larceny, and the other of the larceny only. *R.* v. *Butterworth*, *R.* & *R.* 520 (*see ante*, *p.* 58); *R.* v. *Turner*, 1 *Sid.* 171, *contra*. Where a room door was latched, and a person lifted the latch and entered the room, and concealed himself for the purpose of committing a larceny there, which he afterwards effected; and two other persons were present with him when he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella, it was holden that those two were in law parties to the breaking and entering, and were answerable for the larceny which afterwards took place, though they were not near the spot when it was perpetrated. *R.* v. *Jordan*, 7 *C.* & *P.* 432. Where the breaking is on one night, and the entry the night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence. *Ib.*

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### *Indictment for Burglary by breaking out of a House.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign

of our sovereign lady Victoria, about the hour of eleven in the night of the same day, at the parish aforesaid, in the county aforesaid, being in the dwelling-house of J. N., there situate, one silver sugar basin of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, of the goods and chattels of one J. O., in the said dwelling-house of the said J. N. then and there being, then and there in the said dwelling-house feloniously did steal, take, and carry away; and that the said J. S. being so as aforesaid in the said dwelling-house, and having committed the felony aforesaid, in manner and form aforesaid, he the said J. S. afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, then and there feloniously and burglariously did break out of the said dwelling-house of the said J. N.; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*An indictment stating that the prisoner "did break to get out," or "did break and get out," is bad, the words of the statute being "break out." R.* v. *Compton,* 7 *C. & P.* 139.

*Felony.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 11, (*ante, p.* 297.) *This section of the statute declares, "that if any person shall enter the dwelling-house of another, with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be guilty of burglary." The punishment is the same as stated in the last precedent; ante, p.* 297. *The offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove a larceny in the dwelling-house of J. N., as directed *ante, p.* 170, except that the value of the goods is immaterial. And prove a breaking of the house by the defendant, in the night-time, in order to get out of the same. In *R.* v. *Lawrence,* 4 *C. & P.* 281, *Bolland,* B., held, that escaping from a house by lifting a heavy flap door which had no fastening, but was kept down by its own weight, was not a sufficient breaking out of a house, although, as we have seen *ante, p.* 306, it would constitute a good breaking into a house: perhaps the cases are distinguishable. It is not the less a burglary, because the defendant was *lawfully* in the house, as a lodger, or a guest at an inn. *Reg.* v. *Wheeldon,* 8 *C. & P.* 747.

If it be doubtful whether a felony can be proved, but there be sufficient evidence of an intent to commit a felony, a count may be added, stating the intent. To prove this count, the prosecutor must prove the entry, the intent as in other cases, and the breaking out.

*Indictment for Burglary, and assaulting with Intent to murder.*

*Same as the last precedent but one,* (*ante, p.* 297), *to the* * (*varying the intent charged according to the circumstances*); *then proceed as follows*]:—and that the said J. S. then and there in the said dwelling-house, in and upon the said J. N., in the said dwelling-house then and there being, feloniously did make an assault, with intent him

the said J. N., then and there feloniously, wilfully, and of his malice aforethought, to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, death.* 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 2. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, (*ante, p.* 251). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove the burglary as directed *ante, p.* 298 *et seq.;* and prove also that the defendant assaulted J. N. in the dwelling-house, with intent to murder him. As to the proof of the intent, *see ante, p.* 104. The defendant may be found guilty of the burglary only, if the assault with intent to murder be not proved; or he may be found guilty of an assault only; 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, *ante, p.* 253; or, if a larceny also be charged, he may be found guilty of the larceny only. (*See ante, p.* 309). Upon an indictment for burglary and striking D. *James*, it was proved that D. *Jones* and not D. *James* was struck, and it was holden that the defendant could be convicted only of the burglary. *R.* v. *Parfitt*, 8 *C. & P.* 288.

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*Indictment for Burglary, and Stabbing, &c.*

*Same as the precedent, ante, p.* 297, (*varying the intent charged according to the circumstances*), *to the* * *; then proceed as follows*]: —and that the said J. S. then and there in the said dwelling-house, in and upon the said J. N. in the said dwelling-house then and there being, feloniously did make an assault, and him the said J. S. in and upon the right thigh of him the said J. N., then and there feloniously, unlawfully, and maliciously did stab, cut, and wound ["*stab, cut, wound, beat, or strike*"]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It is not necessary to state the instrument or means by which the injury was inflicted.* *R.* v. *Briggs*, 1 *Mood, C. C.* 318. (*See post, Chap. II, Sect. III*).

*Felony, death. See the last precedent.*

*Evidence.*

Prove the burglary, as directed *ante, p.* 298 *et seq.;* and prove also that the defendant stabbed, cut, wounded, beat, or struck J. N., in the dwelling-house. (*See post, Chap. II, Sect. III*).

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## Sect. 5.

### ARSON.

### BURNING HOUSES, &c.

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*Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 3]—Enacts, that whosoever shall unlawfully and maliciously set fire to any church or chapel, or to any

chapel for the religious worship of persons dissenting from the United Church of England and Ireland, or shall unlawfully or maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sect. 12—*Place and Mode of Imprisonment*]—Enacts, that, where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

7 & 8 *Vict.* c. 62, s. 1—*Setting Fire to Farm Buildings*]—*Recites* 7 *W.* 4 & 1 *Vict.* c. 89, s. 3, *and that it has been doubted whether its provisions extend to the offence of unlawfully and maliciously setting fire to any hovel or shed not being appendant to any house; and* enacts, that whosoever shall unlawfully and maliciously set fire to any hovel, shed, or fold, or to any farm building, or any building or erection used in farming land, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sect. 2—*Setting Fire to Farm Produce or Farming Implements*]—Enacts, that whosoever shall unlawfully set fire to any hay, straw, wood, or other vegetable produce, being in any farm-house or farm building, or to any implement of husbandry being in any farm-house or farm building, with intent thereby to set fire to such farm-house or farm building, and to injure or defraud any person, shall be liable to the pains and penalties of unlawfully and maliciously setting fire to the said farm-house or farm building, with intent thereby to injure or defraud such person.

Sect. 3—*Whipping*]—Enacts, that every male person under the age of eighteen years, who shall be convicted of any offence under this act, shall be liable, at the discretion of the court before which he shall be convicted, in addition to any other sentence which may

be passed upon him, to be publicly or privately whipped, in such manner and so often, not exceeding thrice, as the court shall direct.

Sect. 4]—Enacts, that this act shall be deemed a part of the recited act (7 *W.* 4 *&* 1 *Vict. c.* 89).

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*Indictment for setting Fire to a House, with Intent, &c.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to a certain dwelling-house ("*any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building, or erection, used in carrying on trade or manufacture, or any branch thereof*" or "*any hovel, shed, or fold, or any farm building, or any building or erection used in farming land*") of J. N., there situate, with intent thereby then and there to injure the said J. N., [*or*, to defraud a certain insurance company called ——("*to injure or defraud any person*")]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Where the indictment omitted the word* "*unlawfully,*" *the judges held it to be bad. R.* v. *Turner*, 1 *Mood. C. C.* 239; 4 *C. & P.* 245.

*Felony, transportation for life or for not less than fifteen years, or imprisonment not exceeding three years*, 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 3; 7 *&* 8 *Vict. c.* 62, *s.* 1; *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year, in cases within the* 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 3; *Id. s.* 12; *and in cases within the* 7 *&* 8 *Vict. c.* 62, *s.* 1, *with whipping publicly or privately, not exceeding thrice, if the offender be a male person under eighteen years. Id. s.* 3. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

*On the third day of August, &c.*]—The time here stated need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment, it is sufficient. (*See ante, p.* 96). Where the indictment alleged the offence to have been committed in the night-time, and it was proved to have been committed in the day-time, the judges held the variance to be immaterial. *R.* v. *Minton*, 2 *East, P. C.* 1021. (*See ante, p.* 107).

The parish is material, for it is stated as part of the local description of the house burnt, being referred to by the subsequent words "there situate;" (*ante, p.* 98). Therefore, if the house be proved to be situate in another parish, the defendant must be acquitted. In a late case, upon an indictment for setting fire to a stack of pulse, it was holden that the offence was not of a local nature. *R.* v. *Wood-*

*ward,* 1 *Mood. C. C.* 323. But in that case the indictment gave no local description to the property destroyed.

*Feloniously, unlawfully, and maliciously.*]—The burning must be done wilfully and maliciously, in order to be an offence, either at common law, or within the stat. 7 *W.* 4 *&* 1 *Vict. c.* 89; and therefore no negligence or mischance amounts to it. 4 *Bl. Com.* 222; 3 *Inst.* 67. For which reason, though an unqualified person, by shooting with a gun, happen to set fire to the thatch of a house, this Lord *Hale* determines not to be felony, contrary to the opinion of former writers. 1 *Hale,* 569. But if a man, intending to commit a felony, by accident set fire to another's house, this, it should seem, would be arson at common law, and also within the statute. *See Fost.* 258, 259. If, intending to set fire to the house of A., he accidentally set fire to that of B., it is felony. 1 *Hale,* 569. Even if a man, by wilfully setting fire to his own house, burn also the house of one of his neighbours, it will be felony; (*see R.* v. *Probert,* 2 *East, P. C.* 1031: *R.* v. *Isaac, Ib.*); for the law, in such a case, implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood. And generally, if the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved. The absence of malice or spite to the owner is no answer to the charge. *R.* v. *Salmon, R. & R.* 26.

*Set fire to.*]—The words in stat. 7 *W.* 4 *&* 1 *Vict. c.* 89, are "set fire to," merely; and therefore it is not necessary to aver in the indictment that the house, &c., was *burnt;* nor need it be proved that the house, &c., was actually consumed. *R.* v. *Salmon, R. & R.* 26: *R.* v. *Stallion,* 1 *Mood. C.* 398. But within this act, as well as to constitute the offence of arson at common law, there must be an actual burning of some part of the house; a bare intent, or attempt to do it, is not sufficient. Where, upon an indictment on the repealed stat. 9 *G.* 1, *c.* 22, for setting fire to a paper-mill, it appeared that the defendant set fire to some paper that was drying in one of the lofts, but that no part of the mill itself was burnt; the judges held, that it did not amount to an offence within the act. *R.* v. *Taylor,* 1 *Leach,* 49. And where the defendant set fire to a parcel of unthreshed wheat it was holden not to be within that statute. *R.* v. *Judd,* 2 *T. R.* 255. But the burning and consuming of any part of the house, however trifling, is sufficient, although the fire be afterwards extinguished. 1 *Hawk. c.* 39, *s.* 17; 3 *Inst.* 66; 1 *Hale,* 569; *Dalt.* 506. Where, on an indictment upon the act now in force, it was proved that "the floor of a room was scorched; that it was charred in a trifling way; it had been at a red heat, but not in a blaze;" this was held a sufficient burning to support the indictment. *Reg.* v. *Parker,* 9 *C. & P.* 45. But where, a small faggot having been set on fire on the boarded floor of a room, the boards were thereby "scorched black, but not burnt," and no part of the wood was consumed; this was not held sufficient. *Reg.* v. *Russell, C. & Mar.* 541.

It is seldom that a wilful burning by the defendant can be made out by direct proof; the jury, in general, have to presume the defend-

ant's guilt from circumstantial evidence, (*See ante, p.* 122). Where a house was robbed and burnt, the defendants being found in possession of some of the goods which were in the house at the time it was burnt, was admitted as evidence tending to prove him guilty of the arson. *R.* v. *Rickman*, 2 *East*, 1035.

*A certain Dwelling-house.*]—Arson at common law extended to the burning not only of dwelling-houses, but of all out-houses parcel thereof, such as barns, stables, &c., though not contiguous thereto, nor under the same roof, as in the case of burglary. 1 *Hale*, 567. The statute 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 3, extends to the burning of any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof. Upon an indictment for burning a dwelling-house, either at common law or under the statute, it would, perhaps, be sufficient to prove a burning of a building parcel of the dwelling-house. (*See ante, p.* 305). Where such an out-house was burnt, and an indictment on the stat. 9 *G.* 1, *c.* 22, described it as a "certain out-house," an objection, that the offence should have been described as a burning of the dwelling-house, (the word "out-house" in the statute meaning, as it was suggested, an out-house which is not parcel of a dwelling-house), was overruled by the judges. *R.* v. *North*, 2 *East*, *P. C.* 1021. So, where the indictment described the house, in some of the counts, as "a certain outhouse," in others as a "certain house," and the evidence was of a burning of a school-room, separated from the dwelling-house by a small passage, but the roof of one extending over the roof of the other; it was holden that the evidence satisfied the description in both sets of counts. *R.* v. *Winter*, *R.* & *R.* 295. So, where the indictment charged the burning of "a certain house" of the corporation of Liverpool, and the proof was of a burning of a gaol belonging to the corporation, the judges held it to be sufficient. *R.* v. *Donnevan*, 2 *W. Bl.* 682. But a building constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural instruments, was holden not to be a house, out-house, or barn, within the meaning of the repealed statute: it was not a house in respect of which burglary could be committed—it was a house intended for residence, but not inhabited; and it was not, therefore, a dwelling-house, though it was intended for one: it was not an out-house, because it was not parcel of a dwelling-house: and it was not a *barn*, within the meaning of that statute. *Elsemore* v. *St. Briavells*, 8 *B.* & *C.* 461. So, a building erected, not for habitation, but for workmen to take their meals and dry their clothes in, having four walls, a roof, and a door, but no windows, was held not to be a house within the statute; although a person slept in it with the knowledge, but without the actual permission, of the owner. *Reg.* v. *England*, 1 *C.* & *K.* 533. So, an indictment for burning a stable is not supported by proof of burning a shed, which had been built for and used as a stable originally, but had latterly been used merely as a lumber-shed. *Reg.* v. *Colley*, 2 *M.* & *Rob.* 475. An open building in a field, at a distance from and out of sight of the owner's house, though boarded round and covered in, is not an outhouse within the meaning of this statute. *R.* v. *Ellison*, 1 *Mood. C. C.* 336. But an open shed in a

farm-yard, composed of upright posts supporting pieces of wood laid across them, and covered with straw as a roof, is. *R.* v. *Stallion*, 1 *Mood. C. C.* 398. So, a thatched pigsty, in a yard adjoining the prosecutor's house, is an out-house within the act. *Reg.* v. *Amos Jones*, 2 *Mood. C. C.* 308; 1 *C. & K.* 303. Where a building, formerly a kiln, but latterly used for keeping a cow, was set fire to, and it appeared that the building was one hundred yards from any house, and a much greater distance from the house of the owner—*Taunton*, J., held, that it was neither a stable nor an out-house within the meaning of the statute. *R.* v. *Haughton*, 5 *C. & P.* 555. And where the building fired was a kind of cart hovel, formed of uprights covered with a stubble roof, in a field by itself, some distance from any dwelling—*Vaughan*, B., was of opinion that it was not an out-house, and would have saved the point, but the prisoner was acquitted. *R.* v. *Parrot*, 6 *C. & P.* 402. All these distinctions, however, are now rendered immaterial by the provisions of the stat. 7 & 8 *Vict. c.* 62, *s.* 1, which extends the operation of the former statute to "any hovel, shed, or fold, or any farm-building, or any building or erection used in farming land."

The house also must be proved to be the house of J. N., in the same manner as in burglary. (*Ante, p.* 299). *See R.* v. *Glandfield*, 3 *East, P.C.* 1034. Where a parish pauper set fire to a house in which he was put to reside by the overseers, and it was not known who the trustees were in whom the legal ownership was vested, it was holden that it might be described as the house of the overseers, or of persons unknown. *R.* v. *Rickman*, 2 *East, P. C.* 1034. And a house, in part of which a man lives, but lets other parts to lodgers, may be described as his house, even though he be an insolvent debtor, and have assigned the house to his assignee, if the assignee have not taken possession; at all events, the room in which he lives may be described as his house. *R.* v. *Ball*, 1 *Mood. C. C.* 30. So, if the possession of a house be obtained wrongfully, it may be described as the house of the wrongful occupier. *R.* v. *Wallis*, 1 *Mood. C. C.* 344. At common law, and under the repealed stat. 9 *G.* 1, *c.* 22, it was necessary to describe and prove the house to be the house of another; but under the present statutes, it is immaterial whether the house be that of a third person or of the defendant himself: for these statutes apply, whether the house, &c., be in the possession of the offender, or in the possession of any other person. 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 3; 7 & 8 *Vict. c.* 62, *s.* 1.

*With Intent, &c.*]—The intent stated in the indictment must be proved as laid. Where the offence consists of the setting fire to the house of a third person, the intent to injure that person is inferred from the act, for every person is deemed to intend the necessary consequence of his own act; and therefore, where the defendant was indicted for setting fire to a certain mill, with intent to injure the occupiers thereof, it was holden that he was properly convicted, although it appeared at the trial that he was a harmless, inoffensive man, and had no motive to induce him to commit the act. *R.* v. *Farrington, R. & R.* 207. (*See ante, p.* 104). But this doctrine can only arise where the act is wilful; and therefore, if the fire appear to be the result of accident, the party who is the cause of it will not be liable. (*Ante, p.* 314). On the other hand, where the defendant is

charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence. Where, therefore, upon an indictment for arson, with intent to defraud an insurance company, the policy was inadmissible by reason of its not being stamped, a majority of the judges held that it could not be received in evidence, and as the insurance could not otherwise be proved, the defendant ought to be acquitted. *R.* v. *Gilson, R. & R.* 138. The intention must be to injure some person who is not identified with the defendant. Therefore a married woman cannot be indicted for setting fire to the house of her husband, with intent to injure him. *R.* v. *March,* 1 *Mood. C. C.* 182.

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*Indictment for setting Fire to a Church or Chapel.*

*Commencement as ante, p.* 313]—in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to a certain church ("*any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered and recorded*") there situate; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony.* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 3. *See the last precedent.*

*Evidence.*

Prove that the defendant set fire to the church or chapel, situate as described in the indictment. (*See ante, p.* 313). If it be a chapel of dissenters, &c., it must be proved to have been duly registered and recorded, by the production of the book of registration, or perhaps, by an examined copy of the entry.

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BURNING HOUSES, SOME PERSON BEING THEREIN.

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*Statute.*

7 *W.* 4 & 1 *Vict. c.* 89, *s.* 2]—Enacts, that whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof, shall suffer death.

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*Indictment for setting Fire to a House, some Person being therein.*

*Commencement as ante, p.* 313]—in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to a certain dwelling-house, ("*any dwelling-house*"), of J. N., there situate, one J. L., and M., his wife, then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The defendant cannot, upon this indictment, be convicted under s.* 3, (*ante, p.* 312), *be-*

*cause under that section an intent to injure or defraud some person must be alleged. Reg.* v. *Paice,* 1 *C. & K.* 73.

*Felony, death.* 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 2. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, (*ante, p.* 251). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant set fire to the dwelling-house: (*see ante, p.* 314); and that at the time, J. L. and his wife were in the house,

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## SETTING FIRE TO A COAL-MINE.

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*Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 9]—Enacts, that whosoever shall unlawfully and maliciously set fire to any mine of coal or cannel coal, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

*Indictment.*

*Commencement as ante, p.* 313]—in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to a certain mine of coal, ("*any mine of coal or cannel coal*"), of J. N., there situate; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life or for not less than fifteen years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 9, *with or without hard labour, and with or without solitary confinement, such confinement, not exceeding one month at any one time, nor three months in any one year. Id. s.* 12; (*ante, p.* 312). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69.)

*Evidence.*

Prove that the defendant set fire to the mine, in the occupation of J. N., as described in the indictment. (*See ante, p.* 313). It is not an offence within this act to set fire to a mine in the possession of the party himself. (*See ante, p.* 314).

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## SETTING FIRE TO SHIPS.

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*Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 6]—Enacts, that whosoever shall unlawfully and maliciously set fire to, or in anywise destroy, any ship or vessel, whether the same be complete or in an unfinished state;

or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy, any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

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### *Indictment.*

*Commencement as ante, p.* 313]—in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to a certain ship, ("*any ship or vessel, whether the same be complete or in an unfinished state*"), called the Rattler, the property of J. N., then and there being; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the offence be committed upon the high seas, out of a county, the venue must be laid within the jurisdiction of the Admiralty, as in the next precedent.*

*Felony, transportation for life, or for not less fifteen years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 6, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 12; (*ante, p.* 312). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove that the defendant set fire to the ship. (*See ante, p.* 314). It is immaterial whether the ship were complete, or in an unfinished state. 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 6. A pleasure-boat, eighteen feet long, was set fire to, and *Patteson*, J., inclined to think that it was a vessel within the meaning of the act, but the prisoner was acquitted on the merits, and no decided opinion was given. *R.* v. *Bowyer*, 4 *C.* *&* *P.* 559. Upon an indictment for firing a barge, *Alderson*, J., said, that if the prisoner was convicted, he would take the opinion of the judges as to whether a barge was within the meaning of the statute; the prisoner was acquitted. *R.* v. *Smith*, 4 *C.* *&* *P.* 569. Prove that it was done maliciously, (*see ante, p.* 314), and prove the ownership of the ship as described in the indictment. Where, upon an indictment against the defendant, for setting fire to a ship with intent to prejudice E. and G., his part-owners, it appeared that the defendant had declared that E. and G. were part-owners, and a bill of sale was produced, by which forty-three sixty-fourths of the vessel were transferred by the defendant, the sole owner, to E. and G.; and also an entry in the books of registry, in the following form:—"Custom House, Padstow, 11th August, 1829. W. P., of, &c., has sold, by bill of sale, dated &c., forty-three sixty-fourth shares, to N. G., of &c., and R. E., of &c., Signed," &c.,—and it was objected that the bill of sale was not valid, because, by statute 6 *G.* 4, *c.* 110, *s.* 37, the entry must contain, not only the date of the bill of

sale, but also the date of the production of it; the judge thought that the date, 11th August, in the commencement of the entry, might be considered as the date of the production of it, particularly as the entry followed the form given by the statute; and it was holden that the defendant was properly convicted. *R.* v. *Philp*, 1 *Mood. C. C.* 263. Indeed, it would seem that acts of ownership would of themselves be sufficient to prove this allegation, liable, however, to be rebutted by the entry in the register. The burning of a ship, of which the defendant was a part-owner, is within the statute. *Reg.* v. *Wallace, C. & Mar.* 200.

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*Indictment for setting Fire to a Ship, with Intent, &c.*

Yorkshire, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of Hull, in the county of York, mariner, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, on board a certain ship called the Rattler, the property of J. N., on a certain voyage upon the high seas then being, then and there, upon the high seas, feloniously, unlawfully, and maliciously did set fire to the said ship, ("*any ship or vessel, whether the same be in a complete or unfinished state*") with intent thereby then and there to prejudice the said J. N., the owner ("*owner or part-owner*") of the said ship; [*or*, one E. F., the owner of certain goods, then and there laden and being on board the said ship; *or*, one E. F., who had before then underwritten a certain policy of insurance on the said ship, (*or*, on the freight of the said ship; *or*, on certain goods then being on board the said ship), which said policy was then in full force and operation ("*the owner or part-owner of such ship or vessel, or of any goods on board the same, or any person who hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same*")]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The intent may be stated in different ways in different counts.* (*See R.* v. *Smith*, 4. *C. & P.* 369; *R.* v. *Bowyer*, *Id.* 559.) *As to the venue, see ante, p.* 21.

*Felony.* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 6. *See the last precedent.*

*Evidence.*

If the intent be laid to prejudice the owner of the ship or goods, prove the case as directed under the last form; and in the latter case, prove the shipment of the goods. In *R.* v. *Philp*, 1 *Mood. C. C.* 263, there was no proof of malice against the owners, and the ship was insured for more than its value; but the judge thought that the defendant must be understood to contemplate the consequences of his act; and the judges held that, as to this point, the conviction was right. *See R.* v. *Nevill*, 1 *Mood. C. C.* 458. The destruction of a vessel by a part-owner shews an intent to prejudice the other part-owners, though he has insured the whole ship, and promised that the other part-owners shall have the benefit thereof. *Ib. See Reg.* v. *Wallace, C. & Mar.* 200, *supra.* The underwriters on a policy on goods fraudulently made are within the statute, though no goods be put on board. *S. C.*, 2 *Mood. C. C.* 200.

If the intent be laid to prejudice the underwriters, then, in addition to this evidence, prove the policy, (*see ante, p.* 316: *R.* v. *Gilson, R. & R.* 138), and that the ship sailed on her voyage.

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BURNING SHIPS WITH INTENT TO MURDER.

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*Statute.*

7 *W.* 4 & 1 *Vict. c.* 89, *s.* 4]—Enacts, that whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death.

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*Indictment for setting Fire to a Ship with Intent to Murder.*

*Commencement as ante, p.* 313]—in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to ("*set fire to, cast away, or in anywise destroy*") a certain ship ("*any ship or vessel*") called the Rattler, the property of J. N., then and there being, with intent thereby one J. L., then being in the said ship, then and there feloniously, wilfully, and of his malice aforethought, to kill and murder, ("*to murder any person, or whereby the life of any person shall be endangered*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*If the offence be committed on the high seas out of a county, frame the indictment as in the last precedent.*

*Felony, death.* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 4. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, (*ante, p.* 251). *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant set fire to the ship, that J. L. was at the time in the ship, and prove the intent from circumstances from which it may be inferred.

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SETTING FIRE TO STACKS, &c.

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*Statute.*

7 *W.* 4 & 1 *Vict. c.* 89, *s.* 10]—Enacts, that whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court,

to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

7 & 8 *Vict. c.* 62, *s.* 2.—*Setting fire to farm produce or implements in farm buildings.*]—(*Ante, p.* 312).

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*Indictment for setting Fire to Stacks of Corn, &c.*

*Commencement as ante, p.* 313]—in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to a certain stack of wheat, ("*any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood,*" or "*any hay, straw, wood, or other vegetable produce, being in any farm-house or farm building, or any implement of husbandry being in any farm-house or farm building*"), of J. N., then and there being; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Where the word "unlawfully" was omitted, the judges held the indictment to be bad. R.* v. *Turner,* 1 *Mood. C. C.* 289. *No intent need be stated. R.* v. *Nevill,* 1 *Mood. C. C.* 458. *If, however, the indictment be upon the* 7 & 8 *Vict. c.* 62, *s.* 2, *for setting fire to any farm produce or farming implement in any farm-house or farm building, it must allege an intent thereby to set fire to such farm-house or farm building, and also an intent to injure or defraud some person.*

*Felony, transportation for life or not less than fifteen years, or imprisonment not exceeding three years,* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 10; 7 & 8 *Vict. c.* 62, *s.* 2; *with or without hard labour, and with or without solitary confinement; such confinement not exceeding one month at any one time, nor three months in any one year;* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 12; (*ante, p.* 312); *and also with whipping, public or private, not exceeding thrice, in cases within the* 7 & 8 *Vict. c.* 62, *s.* 2, *where the offender is a male under* 18 *years. Id. s.* 3. *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69.)

*Evidence.*

Prove that the defendant set fire to the stack of wheat, &c., as stated in the indictment; (*see ante, p.* 313); and prove the ownership of the property. An indictment for setting fire to a stack of beans, *R.* v. *Woodward,* 1 *Mood. C. C.* 323, or barley, *R.* v. *Swatkins,* 4 *C. & P.* 548, is good; for the court will take notice that beans are pulse, and barley corn; but it was said before the last statute, that a stack of stubble (not included in the repealed statute) could not be described as a stack of straw. *R.* v. *Reader,* 4 *C. & P.* 245. The prisoner was indicted for setting fire to a stack of wood, and it appeared that the wood set fire to consisted of a score of faggots heaped on the other in a temporary loft over a gateway: *Park,* J., held this not to be a stack of wood. *R.* v. *Aris,* 6 *C. & P.* 348. Upon the repealed statute, which did not contain the word "haulm," it was holden that an indictment for setting fire to a stack of straw was not supported by proof that the stack was composed partly of stubble and partly of coleseed straw. *R.* v. *Tottenham,* 7 *C. & P.* 237; 1 *Mood. C. C.* 461. The offence is not of a local nature. *R.* v. *Woodward,* 1 *Mood. C. C.* 323.

SETTING FIRE TO CROPS, &c.

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*Statute.*

7 *&* 8 *G.* 4, *c.* 30, *s.* 17]—Enacts, that if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

Sect. 27—*Place and Mode of Imprisonment for Malicious Injuries*]—Enacts, that where any person shall be convicted of any indictable offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet. *See* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5; (*ante, p.* 169).

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*Indictment for setting Fire to Crops of Corn, &c.*

*Commencement as ante, p.* 313]—in the county aforesaid, feloniously, unlawfully, and maliciously did set fire to a certain crop of wheat, ("*any crop of corn, grain, or pulse, whether standing or cut down, or any part of a wood, coppice, or plantation of trees, or any heath, gorze, furze, or fern, wheresoever the same may be growing*"), of the goods and chattels of J. N., then and there standing and growing; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for seven years, or imprisonment (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement;* 7 *&* 8 *G.* 4, *c.* 30, *s.* 27; *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169), *not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court sha.. think fit.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 17. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove that the defendant set fire to the crop of wheat, &c. as stated in the indictment, and prove the ownership of the property. *See the last precedent.*

Where the defendant set fire to a summer-house in a wood, and the fire was thence communicated to the wood, he was held to be properly convicted on an indictment charging him with setting fire to the wood. *Reg.* v. *Price*, 9 *C. & P.* 729 ; (*see ante*, *p.* 314).

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### *Indictment for setting Fire to Ships of War, &c.*

*An indictment for setting on fire or burning ships of war may be in the same form as the precedent, ante, p.* 320, *except as to the description of the property, namely,* "any of her Majesty's vessels of war in her Majesty's dock yards, or any private yards, or any timber there placed for building or repairing the same, or any military, naval, or victualling stores, or other munitions of war, or any place where the same shall be kept." 12 *G.* 3, *c.* 24, *s.* 1. *And the same as to setting on fire* "any of the works, or any ship or other vessel lying in or being on the canal, or in any of the docks, basins, cuts, or other works," made by virtue of the stat. 39 *G.* 3, *c.* 69, for regulating the port of London. *And the same as to setting on fire* "any magazine or store of powder, or ship, boat, ketch, hoy, or vessel, or the tackle or furniture thereunto belonging, not appertaining to an enemy or rebel." 22 *G.* 2, *c.* 33, *art.* 25.

## SECT. 6.

## MALICIOUS MISCHIEF.

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### DESTROYING GOODS IN THE LOOM, &C., AND MACHINERY.

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### *Statute.*

7 *&* 8 *G.* 4, *c.* 30, *s.* 3]—Enacts, that if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or articles of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture ; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials

mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

Sect. 25—*Malice against Owner of Property unnecessary*]—Enacts, that every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise.

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*Indictment for cutting, &c., Silk and Goods in the Loom, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, twenty-five yards of woollen cloth, ("*any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work knitted piece, stocking, hose, or lace respectively*"), of the value of five pounds, of the goods and chattels of J. N., in a certain loom ("*in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture*") then and there being, then and there feloniously, unlawfully, and maliciously did cut and destroy, ("*cut, break, or destroy, or damage with intent to destroy or to render useless*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life or for not less than seven years, or imprisonment (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 30, s. 27, (ante, p. 323), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169)), not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 G. 4, c. 30, s. 3. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1, (ante, p. 69).*

*Evidence.*

Prove that the defendant cut or destroyed, &c., the goods in the loom as stated in the indictment, and that they were the property of J. N., either absolutely or specially. Then prove that it was done maliciously. (*See ante, p* 314). It is not necessary to prove that it was done out of malice to the owner. 7 & 8 *G.* 4, *c.* 30. *s.* 25.

If an intent be charged in the indictment, it must be proved by circumstances, if it cannot be inferred from the act itself. (*See ante, p.* 104).

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*Indictment for breaking, &c., Warps of Silk, &c., or Machinery, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain warp of silk, ("*any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles*") of the value of five pounds the goods and chattels of J. N., then and there being, then and there feloniously, maliciously, and unlawfully did cut and destroy ("*cut, break, or destroy, or damage with intent to destroy or to render useless*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, punishable as in the last case.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 3.

*Evidence.*

Prove that the defendant cut or destroyed, &c., the warp of silk, &c., the property of J. N., as stated in the indictment. Where the prisoner, in company with others, unfastened and took away a certain part of a stocking frame, called the half-jack, without which the frame was useless, but did no further injury either to the half-jack or to the frame than the removal of the half-jack; the judges were unanimously of opinion, that this was a damaging the frame within the 28 *G.* 3, *c.* 55, *s.* 4, as it made the frame imperfect and inoperative. *R.* v. *Tacey, R. & R.* 452. Prove also, that it was done maliciously, (*see ante, p.* 318), as in the last case. And if an intent be charged in the indictment, prove it from circumstances, if it cannot be inferred from the act itself. (*See ante, p.* 104).

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*Indictment for entering by Force into a House, &c., with Intent to cut or destroy, &c., Silk Goods, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, into a certain house ("*any house, shop, building, or place*") of J. N., there situate, feloniously and by force did enter, with intent then and there certain woollen goods of the said J. N., in a certain loom then and there being. ("*with intent to commit any of the offences aforesaid,*" *see the last two precedents*), feloniously, unlawfully, and maliciously to cut and destroy; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent but one.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 3.

*Evidence.*

Prove that the defendant entered by force the house in question,

that such house was the house of J. N., that the house was situate as described in the indictment, that the woollen goods were in the house; and prove from circumstances the defendant's intent to be such as is charged in the indictment. (*See ante, p.* 104).

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DESTROYING THRESHING-MACHINES, &c.

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*Statute.*

7 & 8 *G.* 4, *c.* 30, *s.* 4]—Enacts, that if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any threshing-machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any maufacture whatsoever, (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work knitted piece, stocking, hose, or lace), every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

*Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain threshing-machine, ("*any threshing-machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever, except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work knitted piece, stocking, hose, or lace*"), of the value of fifty pounds, the property of J. N., then and there being found, feloniously, unlawfully, and maliciously did cut, break, and destroy, ("*cut, break, or destroy, or damage with intent to destroy or render useless*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for seven years, or imprisonment (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 & 8 *G.* 4, *c.* 30, *s.* 27, (*ante, p.* 323), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)) *not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 & 8 *G.* 4, *c.* 30, *s.* 4.

*Evidence.*

Prove that the defendant cut, broke, or destroyed the threshing-

machine in question; (*see ante, p.* 326: *R.* v. *Tacey, R. & R.* 452); and that it was the property of J. N. Prove that it was done maliciously; (*see ante, p.* 314); but whether from malice to the owner or otherwise is immaterial. 7 & 8 *G.* 4, *c.* 30, *s.* 25, (*ante, p.*.325). In *R.* v. *Crutchley,* 5 *C. & P.* 133, upon an indictment for breaking a threshing-machine, *Patteson,* J., allowed the prisoner's counsel to ask whether the mob had not compelled several persons to join them, and to give each a blow with a sledge-hammer to every machine that was broken; he also allowed the witnesses for the prisoner to prove that he had been forced by the mob to join them, and had resolved to escape on the first opportunity. If the damage were done with intent to destroy the machine, or to render it useless, the intent must be proved from circumstances, if it cannot be implied from the act done. (*See ante, p.* 104). If a threshing-machine be taken to pieces and separated by the owner, the destruction of any part of it is within the statute. *R.* v. *Mackarell,* 4 *C. & P.* 448. So is the destruction of a water-wheel, by which a threshing-machine is worked. *R.* v. *Fidler,* 4 *C. & P.* 449. So, though the side-boards of the machine be wanting, without which it will act, but not perfectly, it is within the statute. *R.* v. *Bartlett,* 2 *Deacon, C. L.* 1517. But if the machine be taken to pieces and in part destroyed by the owner from fear, the remaining parts do not constitute a machine within the meaning of the statute. *R.* v. *West, Id.* 1518.

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## DROWNING MINES, &c.

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### *Statute.*

7 & 8 *G.* 4, *c.* 30, *s.* 6]—Enacts, that if any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, waterway, drain, pit, level, or shaft, of or belonging to any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment: provided always, that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine, in working the same, or by any person duly employed in such working.

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### *Indictment for drowning a Mine.*

*Commencement as ante, p.* 169]—in the county aforesaid, feloniously, unlawfully, and maliciously did cause a quantity of water

("*any water*") to be conveyed into a certain mine, ("*into any mine, or into any subterraneous passage communicating therewith*"), of J. N., there situate, with intent thereby then and there feloniously to destroy ("*destroy or damage, or hinder or delay the working thereof*") the said mine; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The mine may be laid as the property of a person in possession of and working it, though only as agent for others. Reg.* v. *John Jones*, 7 *Mood. C. C.* 293; 1 *C. & K.* 181.

*Felony, transportation for seven years, or imprisonment (with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *& 8 G.* 4, *c.* 30, *s.* 27, (*ante, p.* 323), *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding two years; and, if a male, to be once, twice, or thrice, publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 6.

*Evidence.*

Prove that the defendant caused the water to be conveyed into the mine in the occupation of J. N., as described in the indictment. Prove that it was done maliciously. (*See ante, p.* 318). And prove the intent by circumstances from which it may be inferred. (*See ante, p.* 104). This provision does not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working. 7 *&* 8 *G.* 4, *c.* 30, *s.* 6.

*Indictment for pulling down, &c., Airways, &c., of Mines.*

*Commencement as ante, p.* 169]—in the county aforesaid, feloniously, unlawfully, and maliciously did pull down ("*pull down, fill up, or obstruct*") a certain airway ("*airway, waterway, drain, pit, level, or shaft*") of and belonging to a certain mine of J. N., there situate, with intent thereby then and there to destroy ("*destroy, damage, hinder, or delay the working thereof*") the said mine; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the offence be an obstruction of an airway, &c., the mode of obstruction may be stated in a second count.*

*Felony. See the last precedent.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 6.

*Evidence.*

Prove that the defendant pulled down, &c., the airway of a mine in the occupation of J. N., as described in the indictment. If workmen stop up an airway by order of their master in a portion of his right, it is not felony in the workmen, even though the master know that he has no right to the airway; but if the workmen know that the stopping of the airway is a malicious act of the master, it is felony in the workmen. *R.* v. *James*, 8 *C. & P.* 131. Prove that it

was done maliciously. (*See ante, p.* 314). And prove the intent, as in the last precedent. The proviso in the last case applies to this also.

### DESTROYING ENGINES, ERECTIONS, &c., USED IN MINES.

#### *Statute.*

7 *&* *G.* 4, *c.* 30, *s.* 7]—Enacts, that if any person shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or to render useless, any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection, used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed or in an unfinished state, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned. (*s.* 6, *ante, p.* 328).

#### *Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain steam-engine, the property of J. N., for the sinking, draining, and working of a certain mine of the said J. N., there situate, ("*any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine*") feloniously, unlawfully and maliciously did pull down and destroy ("*pull down or destroy, or damage with intent to destroy or render useless*") against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent but one.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 7.

#### *Evidence.*

Prove that the defendant pulled down or destroyed the engine described in the indictment, and that it was erected for the purposes described in the indictment. It is immaterial whether it was completed or in an unfinished state. 7 *&* 8 *G.* 4, *c.* 30, *s.* 7. A scaffold, erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, was holden to be an *erection* used in conducting the business of the mine, within the meaning of the statute. *Reg.* v. *Whittingham*, 9 *C. &* *P.* 234. Where a steam-engine used in working a mine had been stopped and locked up for the night, and the defendant got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity, and received injury, this was holden to be a damaging of the engine, within the statute. *Reg.* v. *Norris, Id.* 241. Where a mine was worked by a steam-engine, which caused a cylinder called a drum to revolve, and take up the rope as the coal was

drawn up from the mine, it was holden that proof of damaging the drum would not support an indictment which charged the damaging of the steam-engine. *Reg.* v. *Whittingham, supra.* Prove that the mine was in the possession of J. N. Prove that the act was done maliciously; (*see ante, p.* 325); and, if an intent be stated, prove it from circumstances from which that intent may be inferred, if it cannot be implied from the act itself. (*See ante, p.* 104).

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DESTROYING SHIPS, WITH INTENT, &c.

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*Statute.*

7 *W.* 4 *&* *Vict. c.* 89, *s.* 6.]—(*Ante, p.* 318).

*Indictment.*

*Commencement as ante, p.* 320]—on the high seas, feloniously, unlawfully, and maliciously did cast away and destroy ("*cast away, or in anywise destroy*") the said ship, ("*any ship or vessel whether the same be in a complete or unfinished state*"), with intent thereby then and there to prejudice the said J. N., the owner ("*owner, or part owner*") of the said ship, [*or*, one E. F., the owner of certain goods then and there laden and being in and on board the said ship, *or*, one E. F., who had before then underwritten a certain policy of insurance on the said ship, (*or*, on the freight of the said ship, *or*, on certain goods then being on board the said ship), which said policy was then in full force and operation, (*see ante, p.* 320)]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the offence be committed in the body of a county, state the county as venue in the margin, and the special venue, as ante, p.* 319.

*Felony.* (*See ante, p.* 319). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant cast away or otherwise destroyed the vessel, the property of J. N., as stated. (*See ante, p.* 319). It is immaterial whether the ship were complete or in an unfinished state. 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 6. A pleasure-boat eighteen feet long is, it seems, a vessel within the meaning of the act. *R.* v. *Bowyer*, 4 *C. & P.* 559. *See R.* v. *Smith*, 4 *C. & P.* 569, (*ante, p.* 319). If the ship had only run aground, and were afterwards got off in a condition so as to be easily refitted, it seems it would not be an offence within the act. *See R.* v. *De Londo*, 2 *East, P. C.* 1098. Prove the offence to have been done maliciously; (*see ante, p.* 314); and also prove the offence to have been committed with the intent charged in the indictment. Proving that it was done wilfully is of itself sufficient evidence from which the jury may presume that it was committed with intent to prejudice either the owner or part-owner of the ship,

or of the goods; but if the intent charged be to prejudice the underwriters, you must prove the policy, (*see ante, p.* 316; *R.* v. *Gilson, R. & R.* 138), the inception of the risk, and circumstances from which the jury may infer the intent. (*See ante, p.* 104).

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DAMAGING SHIPS, WITH INTENT, &c.

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*Statute.*

7 & 8 Geo. 4, *c.* 30, *s.* 10]—Enacts, that if any person shall unlawfully and maliciously damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

*Indictment.*

*Commencement as ante, p.* 320]—on the high seas, feloniously, unlawfully, and maliciously did damage the said ship, ("*any ship or vessel, whether complete or in an unfinished state*"), by then and there, (*state how*) ("*damage otherwise than by fire*"), with intent thereby then and there to destroy the said ship, [*or*, to render useless the said ship]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the offence be committed in the body of a county, state the county as venue in the margin, and the special venue as ante, p.* 319. *It is not necessary to state the damage to have been done "otherwise than by fire," if the manner of doing the damage is stated. R.* v. *Bowyer*, 4 *C. & P.* 559.

*Felony, transportation for seven years, or imprisonment,* (*with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 & 8 *G.* 4, *c.* 30, *s.* 27, (*ante, p.* 323); *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 & 8 *G.* 4, *c.* 30, *s.* 10.

*Evidence.*

Prove that the defendant damaged the ship in the mode stated in the indictment. It is immaterial whether the ship were in a complete or unfinished state. 7 & 8 *G.* 4, *c.* 30, *s.* 10. Prove that the act was done maliciously. (*See ante, p.* 314). Prove the ownership of the ship; (*see ante, p.* 319); and prove, also, circumstances from which the intent stated in the indictment may be inferred, (*see*

*ante, p.* 104), if it cannot be presumed from the act itself. A pleasure-boat eighteen feet long is, it seems, within this statute. *R.* v. *Bowyer*, 4 *C. & P.* 559. *See R.* v. *Smith*, (*ante, p.* 319).

EXHIBITING FALSE SIGNALS, &c.

*Statute.*

7 *W.* 4 & 1 *Vict. c.* 89, *s.* 5]—Enacts, that whosoever, shall unlawfully exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully or maliciously do anything tending to the immediate loss or destruction of any ship or vessel in distress, shall be guilty of felony, and being convicted thereof, shall suffer death.

*Indictment for exhibiting false Signals.*

Sussex, to wit:—The jurors for our lady the Queen upon their oath present, that, before and at the time of committing the felony hereinafter mentioned, a certain ship ("*any ship or vessel*"), the property of some person or persons to the jurors aforesaid unknown, was sailing on the high seas, [*or*, in a certain river called the ——], near unto the parish of ——, in the county aforesaid; and that J. S., late of the parish aforesaid, in the county aforesaid, labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, well knowing the premises, whilst the said ship was so sailing near unto the said parish as aforesaid, feloniously and unlawfully did exhibit a false light ("*any false light or signal*"), with intent thereby then and there to bring the said ship into danger; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, death.* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 5. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, *s.* 1, (*ante, p.* 251). *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the ship was sailing as stated in the indictment, and that the defendant exhibited the false light or signal. The intent must be proved by the ciccumstances of the case which fairly and naturally lead to that conclusion, or by declarations made by the defendant. (*See ante, p.* 104).

*Indictment for doing an Act tending to the immediate Loss of a Ship in Distress.*

*Commencement as in the last precedent*]—near unto the parish of ——, in the county aforesaid, which said ship was then and there in distress, and that J. S. late of the parish aforesaid, in the county aforesaid,

labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, well knowing the premises, whilst the said ship was so in distress as aforesaid, feloniously, unlawfully, and maliciously did (*&c. stating the act done—"anything"*), the said act so done by the said J. S. as aforesaid, then and there tending to the immediate loss ("*loss or destruction*") of the said ship; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, death. See the last precedent.*

*Evidence.*

Prove that the ship was in distress, and that the defendant knew it; prove that the act was done maliciously; (*see ante, p.* 314); and prove that the act done tended to the immediate loss or destruction of the ship.

DESTROYING PARTS OF SHIPS, &C.

*Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 8]—Enacts, that whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years.

*Indictment for destroying part of a Ship, &c., in Distress.*

*Commencement as ante, p.* 333]—the property of some person or persons to the jurors aforesaid unknown was stranded and cast ashore ("*in distress, or wrecked, stranded, or cast ashore*") at the parish of ——, in the county aforesaid, and that J. S., late of the parish aforesaid, in the county aforesaid, labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, and whilst the said ship was so stranded and cast ashore as aforesaid, the hull of the said ship ("*any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel*") feloniously, unlawfully, and maliciously did destroy; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for not more than fifteen nor less than ten years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 8, *with or without hard labour, and with or without solitary con-*

*finement, such confinement not exceeding one month at any one time, nor three months in any one year.* *Id. s.* 12, (*ante, p.* 312).

*Evidence.*

Prove that the ship was stranded or cast ashore; prove the destruction of that part of the ship stated in the indictment, and that it was done by the defendant maliciously. (*See ante, p.* 314).

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CUTTING AWAY, &c. BUOYS, &c.

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*Statute.*

1 & 2 *G.* 4, *c.* 75, *s.* 11]—Enacts, that if any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal, any buoy, buoy-rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or, in mitigation of such punishment, to be imprisoned for any number of years, at the discretion of the court in which the conviction shall be made.

*Indictment.*

Sussex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of Sussex, labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, upon the high seas, did then and there feloniously and wilfully cut away a certain buoy ("*any buoy, buoy-rope, or mark*") belonging to a certain ship called the Rattler, the property of J. N., and then and there attached to a certain anchor and cable belonging to the said ship; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for seven years, or imprisonment for any number of years, in the discretion of the court.* 1 & 2 *G.* 4, *c.* 75, *s.* 11. *The statute does not apply to Ireland or Scotland, nor does it affect the cinque port or pilot acts.* Sects. 33, 36.

*See stat.* 2 *G.* 2, *c.* 28, *s.* 13, *as to cutting and destroying, &c., cordage, &c., in the river Thames; and* 1 & 2 *G.* 4, *c.* 76, *as to offences committed within the jurisdiction of the cinque ports.*

*Evidence.*

Prove that the buoy, &c., belonging to the ship described in the indictment was attached to an anchor and cable belonging to the ship; and prove that the defendant cut away the buoy, &c., wilfully. If an intent be charged in the indictment, circumstances must be proved from which that intent may be presumed by the jury.

DESTROYING SEA BANKS, LOCKS, AND PILES, &c.

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*Statute.*

7 & 8 *G.* 4, *c.* 30, *s.* 12]—Enacts, that if any person shall unlawfully and maliciously break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, flood-gate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and, being, convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any flood-gate, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and, being convicted there of, shall beliable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

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*Indictment for cutting down River or Sea Banks.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain part of the bank ("*any sea bank or sea wall, or the bank or wall of any river, canal, or marsh*") of a certain river called the river ——, there situate, then and there feloniously, unlawfully, and maliciously did cut down and break down, by means whereof certain lands were then and there overflowed and damaged [*or,* were in danger of being overflowed and damaged]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life, or for not less than seven years, or imprisonment, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 & 8 *G.* 4, *c.* 30, *s.* 27, (*ante, p.* 323), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 & 8 *G.* 4, *c.* 30, *s.* 12. *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant broke down or cut down the banks of the river, situate as described in the indictment. Prove, also, that the offence was committed maliciously; (*see ante, p.* 314); and prove that, in consequence of the breaking or cutting of the banks, certain lands were, or were in danger of being, overflowed, as stated in the indictment.

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*Indictment for throwing down, &c., Locks on Rivers, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain lock, ("*any lock, sluice, flood-gate, or other work*") on a certain canal, ("*any navigable river or canal*"), called the ——, there situate and being, then and there feloniously, unlawfully, and maliciously did throw down, ("*throw down, level, or otherwise destroy*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 12.

*Evidence.*

Prove that the defendant threw down, &c., the lock in question, upon the canal or navigable river, as described in the indictment; prove the local situation of the canal or river; and prove that it was done maliciously. (*See ante, p.* 314).

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*Indictment for cutting, &c., Piles, &c., in Rivers or Sea Banks.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain pile, ("*any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank or wall of any river, canal, or marsh*"), then and there fixed in the ground, and then and there used for securing the bank of a certain river called the river ——, there situate, then and there feloniously, unlawfully, and maliciously did cut off, ("*cut off, draw up, or remove*"); against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

*Felony, transportation for seven years, or imprisonment, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 30, *s.* 27, (*ante, p.* 323), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 12, (*ante, p.* 336).

*Evidence.*

Prove that the pile was fixed in the ground, and used to secure the

bank of the river, situate as described in the indictment; prove that the defendant cut it, and prove that he did so maliciously. (*See ante, p.* 314).

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*Indictment for opening Flood-gates, &c., with Intent, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, feloniously, unlawfully, and maliciously did open and draw up ("*open or draw up any flood-gate, or do any other injury or mischief to any navigable river or canal*") a certain flood-gate there situate, of and belonging to a certain navigable river called the river ——, with intent thereby ("*with intent and so as thereby*") then and there to obstruct and prevent ("*obstruct or prevent*") the carrying on ("*carrying on, completing, or maintaining*") of the navigation of the said navigable river; and that the said J. S. thereby then and there did obstruct the carrying on of the navigation of the said navigable river; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent.* 7 & 8 *G.* 4, *c.* 30, *s.* 12.

*Evidence.*

Prove that the defendant opened or drew up the flood-gate of the navigable river in question, in the parish stated in the indictment. Prove that he did so maliciously; (*see ante, p.* 314); prove the intent from circumstances from which the jury may infer it; (*see ante, p.* 104); and prove that the navigation was obstructed, which alone will be sufficient evidence of the intent.

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DESTROYING PUBLIC BRIDGES, &c.

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*Statute.*

7 & 8 *G.* 4, *c.* 30, *s.* 13]—Enacts, that if any person shall unlawfully and maliciously pull down, or in anywise destroy, any public bridge, or do any injury with intent and so as therebv to render such bridge or any part thereof dangerous or impassable every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

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*Indictment for pulling down a Public Bridge.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain public bridge ("*any public bridge*") there situate, then and there feloniously, unlawfully, and maliciously did pull down and destroy

(*"pull down, or in anywise destroy"*); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life, or not less than seven years, or imprisonment, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4. c. 30, s. 27, (ante, p. 323), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169)), not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 G. 4, c. 20, s. 13. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1, (ante, p. 69).*

*Evidence.*

Prove that the defendant pulled down or destroyed the bridge, which was a public bridge, and situate as described in the indictment; and prove that it was done maliciously. (*See ante, p.* 314).

*Indictment for injuring a Bridge, &c.*

*Commencement as ante, p.* 169]—in the county aforesaid, feloniously, unlawfully, and maliciously did (*state the injury*) a certain public bridge there situate, with intent thereby (*" with intent and so as thereby"*) then and there to render the said bridge (*" such bridge or any part thereof"*) dangerous and impassable; and that the said J. S. did thereby then and there render the said bridge dangerous and impassable; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent.* 7 & 8 *G.* 4, *c.* 30, *s.* 13.

*Evidence.*

Prove that the defendant did the injury to the public bridge stated in the indictment. Prove that the bridge is situated as described; and prove that the act was done maliciously by the defendant. (*See ante, p.* 314). Circumstances must be proved, from which the intent may be inferred; (*see ante, p.* 104); and it must also be proved that the bridge was, by the act of the defendant, rendered dangerous or impassable, which alone is sufficient evidence of the intent.

DESTROYING TURNPIKE-GATES, &C.

*Statute.*

7 & 8 *G.* 4, *c.* 30, *s.* 14]—Enacts, that if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate set up or erected

to prevent passengers passing by without paying any toll directed to be paid by any act or acts of Parliament relating thereto, or any house, building, or weighing-engine, erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly.

*Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain turnpike-gate ("*any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of Parliament relating thereto, or any house, building or weighing-engine erected for the better collection, ascertainment, or security of any such toll*"), there situate, then and there unlawfully and maliciously did throw down, level, and destroy, ("*throw down, level, or otherwise destroy, in whole or in part*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, fine or imprisonment, or both.* 7 & 8 *G.* 4, *c.* 30, *s.* 14.

*Evidence.*

Prove that the defendant threw down, levelled, or otherwise destroyed the turnpike-gate, situate as described in the indictment; and that it was done maliciously. (*See ante, p.* 314).

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OBSTRUCTING ENGINES OR CARRIAGES ON RAILWAYS, &c.

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*Statute.*

3 & 4 *Vict. c.* 97, *s.* 15]—Enacts, that every person who shall wilfully do, or cause to be done, anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or who shall aid or assist therein, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court before which he shall have been convicted, to be imprisoned, with or without hard labour, for any term not exceeding two years.

Sect. 21—*Meaning of the word "Railway"*]—Enacts, that whereever the word "railway" is used in this act, it shall be construed to extend to all railways constructed under the powers of any act of Parliament, and intended for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam, or by any other mechanical power.

*Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, unlawfully and wilfully did (*state the act—"anything"*) in such manner as thereby to obstruct a certain engine and certain carriages then and there using a certain railway called ———, and to endanger the safety of divers persons then and there conveyed in and upon the said engine and carriages, and that the said J. S. did thereby then

and there obstruct the said engine and carriages, and endanger the safety of the said persons so conveyed in and upon the same as aforesaid; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, imprisonment, with or without hard labour, not exceeding two years.* 3 *&* 4 *Vict. c.* 97, *s.* 15.

### *Evidence.*

Prove that the defendant did, or aided and assisted in doing, the act charged in the indictment; that it was done wilfully; and that the effect of it was to obstruct an engine or carriage using the railway, or to endanger the safety of persons conveyed in or upon the engine or carriage. The word "wilfully," in the statute, means no more than designedly, and it is not necessary to shew that the defendant did the act expressly with the object of obstructing the carriages, &c. *Reg.* v. *Holroyd*, 2 *M. & Rob.* 339.

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## DESTROYING DAMS OR FISH PONDS, &c.

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### *Statute.*

7 *&* 8 *G.* 4, *c.* 30. *s.* 15]—Enacts, that if any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fish pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down or otherwise destroy the dam of any mill pond, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years; or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

### *Indictment for breaking down the Dam of a Fish Pond.*

*Commencement as ante, p.* 169]—in the county aforesaid, the dam of a certain fish pond, ("*the dam of any fish pond, or of any water which shall be private property, or in which there shall be any private right of fishery*"), of one J. N., there situate, then and there unlawfully and maliciously did break down and destroy, ("*break down or otherwise destroy*"), with intent thereby then and there to take and destroy the fish in the said pond then and there being, [*or*, and did thereby then and there cause the loss and destruction of divers of the fish in the said pond then and there being]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, transportation for seven years, or imprisonment, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 30, *s.* 27, (*ante, p.* 323), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 15.

*Evidence.*

Prove that the defendant broke down or destroyed the dam of the fish pond of J. N., situate as described in the indictment; and that it was done maliciously (*see ante, p.* 314); and prove circumstances from which the intent may be inferred (*see ante, p.* 104); and if the loss of fish be stated in the indictment, prove that fact.

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### *Indictment for putting Lime, &c. into a Fish Pond.*

*Commencement as ante, p.* 169]—in the county aforesaid, unlawfully and maliciously did put a large quantity, to wit, ten bushels of lime ("*lime or other noxious material*") into a certain fish pond, (*see the last precedent*) of one J. N., there situate, with intent thereby then and there to destroy the fish in the said pond then and there being; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor. See the last precedent.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 15.

*Evidence.*

Prove that the defendant put lime, &c. into the fish pond of J. N., situate as described in the indictment, and that it was done maliciously (*see ante, p.* 314); and prove circumstances from which the jury may infer the intent, (*see ante, p.* 104), as, that the lime or other noxious thing would destroy the fish.

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### *Indictment for breaking down a Mill Dam.*

*Commencement as ante, p.* 169]—in the county aforesaid, the dam of a certain mill pond of J. N., there situate, unlawfully and maliciously did break down and destroy, ("*break down or otherwise destroy*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor. See the last precedent but one.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 15.

*Evidence.*

Prove that the defendant broke down the dam of a mill pond in the occupation of J. N., situate as described in the indictment; and prove that it was done maliciously. (*See ante, p.* 314).

## KILLING OR MAIMING CATTLE.

### *Statute.*

*7 & 8 G. 4, c. 30, s. 16*]—Enacts, that if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years; or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

*7 W. 4 & 1 Vict. c. 90, s. 2*]—*Recites 7 & 8 G. 4, c. 30, and repeals so much thereof as relates to the punishment of persons convicted of any of the offences therein specified*, and enacts, that every person convicted after the commencement of this act (1st Oct. 1837) of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, and not less than ten years; or to be imprisoned for any term not exceeding three years.

### *Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, one gelding, ("*any cattle*"), of the price of ten pounds, of the goods and chattels of J. N., then and there being, feloniously, unlawfully, and maliciously did kill, ("*kill, maim, or wound*"); against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The particular species of cattle killed, maimed, or wounded must be specified; an allegation that the prisoner maimed certain cattle is not sufficient. R.* v. *Chalkley, R. & R.* 258. *The word "cattle" is the only word used in the statute; and this, in former statutes upon this subject,* (9 *G.* 1, *c.* 22, *s.* 1; 4 *G.* 4, *c.* 54, *s.* 2), *has been holden to include horses, as well as oxen, &c. R.* v. *Paty,* 2 *W. Bl.* 721; *and also pigs, R.* v. *Chapple, R. & R.* 77; *and asses, R.* v. *Whitney,* 1 *Mood. C. C.* 3.

*Felony, transportation for not more than fifteen nor less than ten years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 2, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 195).

### *Evidence.*

Prove that the defendant killed the horse, the property of J. N. Prove, also, that it was done maliciously; (*see ante, p.* 314); but it is not now necessary, as it was formerly, to prove the offence to have been committed from malice to the owner. *Reg.* v. *Tivey,* 1 *C. & K.* 704.

Upon an indictment for administering sulphuric acid to a horse, evidence may be given of other acts of administering, in order to shew the intent. *R.* v. *Mogg,* 4 *C. & P.* 364.

To constitute a *maiming* within this statute, a *permanent* injury must be inflicted on the animal. *Reg.* v. *Jeans*, 1 *C. & K.* 539. But if a *wounding* be alleged, it is not necessary to prove a permanent injury. Where the wounding proved was driving a nail into the frog of a horse's foot, but it appeared that the horse was likely to recover, it was objected that no wounding was within the meaning of the act, that was not productive of permanent injury to the animal; but the judges overruled the objection, holding that the word "wound" was used by the legislature as contradistinguished from maiming, which is a permanent injury. *R.* v. *Haywood*, 2 *East, P. C.* 1076; *R. & R.* 16.

Upon an indictment for killing, wounding, and maiming a mare, it appeared that the defendant poured nitrous acid into her ear, some of which either ran into her eye, or was poured into it, and blinded her: she was killed by her owner, and surgeons proved that the injuries done to the ear were not wounds, but ulcers; the defendant was therefore convicted of the maiming, and the judges held the conviction right. *R.* v. *Owens*, 1 *Mood. C. C.* 205.

Upon an indictment for wounding a sheep, it appeared that the prisoner set a dog at the sheep, which bit it; and *Park*, J., held that this was not a wounding within the meaning of the act. *R.* v. *Hughes*, 2 *C. & P.* 420. But where the prisoner set fire to a cowhouse, in which was a cow, which was burnt to death, *Taunton*, J., held, that the prisoner could be convicted upon an indictment for killing the cow. *R.* v. *Haughton*, 5 *C. & P.* 559.

## DESTROYING HOPBIND.

### *Statute.*

7 *& 8 G.* 4, *c.* 30, *s.* 18]—Enacts, that if any person shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 2—*Recites* 7 *&* 8 *G.* 4, *c.* 30, *s.* 18, *and repeals so much thereof as relates to the punishment of persons convicted of offences therein specified, and* enacts, that every person convicted after the commencement of this act (1st Oct. 1837) of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.

### *Indictment.*

*Commencement as ante, p.* 169]—in the county aforesaid, one thousand hopbinds, the property of one J. N., then and there grow-

ing on poles in a certain plantation of hops of the said J. N. there situate, then and there feloniously, unlawfully, and maliciously did cut and destroy, ("*cut or otherwise destroy*"); against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for not more than fifteen years, nor less than ten years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 2, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3. (*ante, p.* 195).

### *Evidence.*

Prove that the defendant cut or otherwise destroyed the hopbinds, or some part of them, as alleged; that they were at the time growing in a plantation of hops, situate as described; and that the plantation belonged to J. N. Prove also, that the act was done maliciously. (*See ante, p.* 314).

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## DESTROYING TREES, &c.

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### *Statute.*

7 *&* 8 *G.* 4, *c.* 30, *s.* 19]—Enacts, that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned.

### *Indictment for cutting, &c., Trees, &c., in Parks, &c., Value above 1l.*

*Commencement as ante, p.* 169]—in the county aforesaid, two elm trees, ("*the whole or any part of any tree, sapling, or shrub, or any underwood*") the property of J. N., then and there growing in a certain park ("*park, pleasure-ground, garden, orchard, or avenue, or*

*any ground adjoining or belonging to a dwelling-house*") of the said J. N., there situate, then and there feloniously, unlawfully, and maliciously did cut and damage, ("*cut, break, bark, root up, or otherwise destroy or damage*"), thereby then and there doing injury to the said J. N. to an amount exceeding the sum of one pound, to wit, the amount of two pounds; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *A count may be added for cutting with intent to steal the trees.* (*See ante, p.* 207).

*Felony, transportation for seven years, or imprisonment,* (*with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 30, *s.* 27, (*ante, p.* 323), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 19.

*Evidence.*

Prove that the defendant "cut, broke, barked, rooted up, or otherwise destroyed or damaged" (these are the words in the statute) one or more of the trees mentioned in the indictment, and that the injury done exceeds the sum of one pound. A variance in the number of trees is not material. Prove that the trees, at the time, were growing in a park, situate as described in the indictment, (*or*, "in a pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house"); *see R.* v. *Hodges, M. & M.* 341, (*ante, p.* 207); and that they were the property of J. N. Prove, also, that the trees were cut maliciously; (*see ante, p.* 314); but, if it be doubtful whether the defendant did not intend to steal the trees, add a count to meet that. (*See ante, p.* 104).

*Indictment for cutting, &c., Trees, &c., growing elsewhere. Value above 5l.*

*Commencement as ante, p.* 169]—in the county aforesaid, ten elm trees, (*see the last precedent*), the property of J. N., then and there growing in a certain close, ("*elsewhere than a park,*" *&c., see the last precedent*), of the said J. N., there situate, then and there feloniously, unlawfully, and maliciously did cut and damage, (*see the last precedent*), thereby then and there doing injury to the said J. N. to an amount exceeding the sum of five pounds, to wit, the amount of six pounds; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent.* 7 *&* 8 *G.* 4, *c.* 30, *s.* 19.

*Evidence.*

Prove that the defendant cut, &c., the trees mentioned in the indictment, or some of them: that the trees were the property of J. N. that is, that they were growing on land belonging to him, or in his occupation; that the damage exceeds *5l.*; and that the cutting was done maliciously. (*See ante, p.* 314). It is not necessary to prove that the trees grew elsewhere than in a park, &c.

DESTROYING TREES, &c., AFTER PREVIOUS CONVICTIONS.

*Statute.*

7 & 8 *G.* 4, *c.* 30, *s.* 20]—Enacts, that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at the least, every such offender, being convicted before a justice of the peace, shall, for the first offence, forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall, for such second offence, be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned. (*s.* 19, *ante, p.* 345).

Sect. 40]—Enacts, that every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against, until the contrary be shewn.

*Indictment, after Two previous Convictions, for cutting Trees, &c. wheresoever growing, Value* 1*s.*

*Commencement as in the precedent, ante, p.* 208; *stating the two previous convictions, to the end*]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, labourer, afterwards, and after he had been so twice convicted as aforesaid, to wit on the third day of August, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, one other elm tree, ("*the whole or any part of any tree, sapling, or shrub, or any underwood*"), the property of J. N., then and there growing, feloniously, unlawfully, and maliciously did cut and damage, ("*cut, break, bark, root up, or otherwise destroy*"),

thereby then and there doing injury to the said J. N. to the amount of two shillings; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent but one.* 7 & 8 *G.* 4, *c.* 30, *s.* 20.

*Evidence.*

Prove the two previous convictions by an examined or certified copy. (*See ante, p.* 125; 7 & 8 *G.* 4, *c.* 30, *s.* 40, *supra*). Prove the identity of the defendant; and prove that he cut and damaged the tree, the property of J. N.; prove that it was done maliciously; (*see ante, p.* 314); and prove that the damage exceeds 1*s.*

DESTROYING PLANTS, &c.

*Statute.*

7 & 8 *G.* 4, c. 30, *s.* 21]—Enacts, that if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned. (*s.* 19, *ante, p.* 345).

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*Indictment after a previous Conviction, for destroying Plants, &c., in a Garden, &c.*

*Commencement as in the precedent, ante, p.* 208, *setting out the conviction to the end*]—And the jurors aforesaid, upon their oath aforesaid, do further present, the said J. N., late of the parish of B., in the county of M., labourer, afterwards, and after he was so convicted as aforesaid, on the third day of August, in the year aforesaid, at the parish of B., in the said county of M., twenty pounds weight of grapes, ("*any plant, root, fruit, or vegetable production*") of the value of five shillings, the property of J. N., in a certain garden, ("*in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory*"), of the said J. N., there situate, then and there growing, then and there feloniously, unlawfully, and maliciously did destroy, ("*destroy, or damage with intent to destroy*"); against the form of the statute in such case made and pro-

vided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent but two.* 7 & 8 *G.* 4, *c.* 30, *s.* 21.

*Evidence.*

Prove the former conviction by an examined or certified copy, (*ante, p.* 125), and the identity of the defendant. Prove the second offence stated in the indictment; that the defendant destroyed the grapes; that they were, at the time, growing in the garden of J. N., situate as described in the indictment; and that the offence was committed maliciously. (*See ante, p.* 314).

The words "plant" or "vegetable production" do not apply to young trees. *R.* v. *Hodges, M. & M.* 341. (*See ante, p.* 211).

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DESTROYING OR DAMAGING WORKS OF ART, &c., IN MUSEUMS, &c.

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*Statute.*

8 & 9 *Vict. c.* 44, *s.* 1]—Enacts, that from and after the passing of this act, every person who shall unlawfully and maliciously destroy or damage anything kept for the purposes of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library, or other repository is, either at all times, or from time to time, open for the admission of the public, or of any considerable number of persons, to view the same, either by permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, or painted glass, in any church or chapel, or other place of religious worship, or any statue or monument exposed to public view, shall be guilty of a misdemeanor, and being duly convicted thereof, shall be liable to be imprisoned for any period not exceeding six months, and if a male, may, during the period of such imprisonment, be put to hard labour, or be once, twice, or thrice privately whipped, in such manner as the court before which such person shall be tried shall direct.

Sect. 2—*Malice against the Owner not necessary*]—Enacts, that every punishment imposed on any person for an offence against this act shall apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the thing damaged or destroyed, or not.

Sect. 3—*Apprehension of Offender*]—Enacts, that any person found committing any offence against this act may be immediately apprehended, without a warrant, by any other person, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

Sect. 4—*Not to affect Right of Action*]—Enacts, that nothing herein

contained shall be deemed to affect the right of any person to recover by action at law damages for the injury so committed.

Sect. 5—*Accessaries*]—Enacts, that every person who shall abet, counsel, or procure the commission of any offence against this act, shall be punished as a principal offender.

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## Sect. 7.

### FORGERY.

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### FORGERY GENERALLY.

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*Statutes.*

2 & 3 *W.* 4, *c.* 123, *s.* 3—*Form of Indictment for Forgery*]—In order to prevent justice from being defeated by clerical or verbal inaccuracies, enacts, that in all informations or indictments for forging or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or fac-simile thereof, but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same; any law or custom to the contrary notwithstanding.

11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 24—*Venue for Forgery*]—Enacts, that if any person shall commit any offence against this act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any statute or statutes made or to be made, the offence of every such offender may be dealt with, indicted, tried, and punished, and laid and charged to have been committed, in any county or place in which he shall be apprehended or be in custody, as if his offence had actually been committed in that county or place; and every accessary before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, tried, indicted and punished, and his offence laid and charged to have been committed, in any county or place in which the principal offender may be tried.

Sect. 28—*Criminal Possession and Intent—Explanation of Terms used*]—Declares and enacts, that where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment,

field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession, within the meaning of this act; and where the committing any offence with intent to defraud any person whatsoever is made punishable by this act, in every such case the word "person" shall throughout this act be deemed to include his majesty or any foreign prince or state, or any body corporate, or any company or society of persons not incorporated, or any person or number of persons whatsoever who may be intended to be defrauded by such offence, whether such body corporate, company, society, person, or number of persons shall reside or carry on business in England or elsewhere, in any place or country, whether under the dominion of his majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person named, and another or others, as the case may be.

Sect. 30—*Forging and uttering in England Instruments made and payable out of England, and vice versâ*]—Provides, declares, and enacts, that where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this act expressed to be an offence, if any person shall, in that part of the United Kingdom called England, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter, in whatsoever place or country out of England, whether under the dominion of his majesty or not, such writing or matter may purport to be made, or may have been made, and in whatever language or languages the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made, or had been made, in England: and if any person shall in England forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange, or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money, (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), in whatever place or country out of England, whether under the dominion of his majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory, may be, or may purport to be, payable, and in whatever language or languages the same respectively, or any part thereof, may be expressed, and whether such bill, note, undertaking, warrant, or order, be or be not under seal, every such person, and every person aiding, abetting, or counselling such person shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby, in the same manner as

if the money had been payable, or had purported to be payable, in England.

9 *Geo.* 4, *c.* 32, *s.* 2—*Competency of Witnesses*]—Enacts, that on any prosecution by indictment or information, either at common law or by virtue of any statute, against any person, for forging any deed, writing, instrument, or other matter whatsoever, or for uttering or disposing of any deed, writing, instrument, or other matter whatsoever, knowing the same to be forged; or for being accessary before or after the fact to any such offence, if the same be a felony; or for aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor; no person shall be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person may have, or be supposed to have, in respect of such deed, writing, instrument, or other matter.

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 1—*Punishment for Forgery in general*]—Whereas several offences relating to forged writings, and to other forged and counterfeit matters, and to false personation, false oaths, false entries, and other false matters, are now by virtue of several statutes punishable with death: and whereas it is expedient that none of those offences shall hereafter be punishable with death, unless the same shall be made punishable with death by this act; and also that the statutes concerning such of those offences, whether punishable with death or otherwise, as may more frequently or seriously affect the interests of his majesty or his subjects, should be amended, and consolidated into this act: be it therefore enacted, that where, by any acts now in force, any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to be falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavouring to receive or have anything, or to do or cause to be done, any act, upon or by virtue of any matter whatsoever, knowing such matter to be falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where, by any acts now in force, any person falsely personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund, in the name of any person not being the owner thereof, or knowingly taking a false oath, or knowingly making a false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where, by any acts now in force, any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for the making of paper, with certain

words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall, after the commencement of this act, be convicted of any such felony as is hereinbefore mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, such person shall not suffer death for the same, unless the same shall be made punishable with death by this act; and if the same shall not be made punishable with death by this act, in such case every person who shall, after the commencement of this act, be convicted of any such felony, or of aiding, abetting, counselling, or procuring the commission thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years; provided always, that nothing herein contained shall affect or alter any acts relating to the coin of this realm, or to any coin of any other realm lawfully current within this realm.

Sect. 23—*Punishment by 5 Eliz. c.* 14, *repealed, and other Punishments substituted*]—And whereas by an act passed in the fifth year of the reign of Queen Elizabeth, intituled "*An Act against Forgers of false Deeds and Writings*," it is, amongst other things, provided, that every person convicted of any of the offences first enumerated in that act shall pay to the party grieved his double costs and damages, and shall forfeit to the crown the whole issues of his lands and tenements during his life, and shall also suffer imprisonment during his life; and whereas there are certain acts by which persons convicted of certain offences, mentioned in those acts, are subjected to the same pains and penalties as are imposed by the said act of Queen Elizabeth for the offences first enumerated in that act; and whereas the said act of Elizabeth is hereinafter repealed; and it is expedient to substitute other punishments in lieu of the punishments of that act, so far as the same have been adopted by any other acts: be it therefore enacted, that every person who shall, after the commencement of this act, be convicted of any offence which is now subjected by any act or acts to the same pains and penalties as are imposed by the said act of Queen Elizabeth for any of the offences first enumerated in that act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, nor less than one year.

2 & 3 *W.* 4, *c.* 123, *s.* 1—*Commutation of Punishment for Forgery*] —Whereas, by an act passed in the first year of his present majesty's reign, intituled "*An Act for reducing into one Act all such Forgeries as shall hereafter be punished with Death, and for otherwise amending the Laws relative to Forgery*," it was provided, that if any person should, after the commencement of that act, be convicted of any forgery, or other offence therein named or described, for which he would, at the time of the passing of that act, have been liable to

the punishment of death, he should not suffer death for the same, unless the same should be made punishable with death by that act. And whereas, by the law and practice now prevailing in Scotland and Ireland, the penalty of death may be awarded in certain cases for forgery, for uttering counterfeit instruments, and for false personation; and whereas, it is expedient to abolish the punishment of death for offences of that nature, except so far as relates to wills and certain powers of attorney, as hereinafter mentioned: be it therefore enacted, that where any person shall, after the passing of this act, be convicted of any offence whatsoever, for which the said act enjoins or authorises the infliction of the punishment of death, or where any person shall, after the passing of this act, be convicted in Scotland or Ireland of any offence now punishable with death, which offence shall consist wholly or in part of forging or altering any writing, instrument, matter, or thing whatsoever, or of offering, uttering, or disposing of any writing, instrument, matter or thing whatsoever, knowing the same to be forged or altered, or of falsely personating another, then, and in each of the cases aforesaid, the person so convicted of any such offence as aforesaid, or of procuring or aiding or assisting in the commission thereof, shall not suffer death, or have sentence of death awarded against him, but shall be transported beyond the seas for the term of such offender's life.

Sect. 2—*Forging Wills and Powers of Attorney*]—Provides and enacts, that notwithstanding anything hereinbefore contained, this act shall not be construed to affect or alter the said recited act, or any other act or law now in force, so far as the same may authorise the punishment of death to be inflicted upon any person convicted, either in England, Scotland, or Ireland, of forging or altering, or of offering, uttering, or disposing of, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, with intent to defraud any body corporate or person whatsoever, or of forging or altering, or of uttering, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or South Sea House, or at the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate or person whatsoever, or of procuring, aiding, or assisting in the commission of any of the said offences, but that the punishment for each and every of the said offences, and for procuring, aiding, or assisting in the commission thereof, shall continue to be the same as if this act had not been passed.

*7 W. 4 & 1 Vict. c. 84. s. 1—Abolition of the Punishment of Death in Cases of Forgery*]—*Recites those provisions of the* 11 *G.* 4 & 1 *W.* 4, *c.* 66, *and* 2 & 3 *W.* 4, *c.* 123, (whereby the punishment of death was retained for the forgery of wills and powers of attorney) *and recites also the* 2 & 3 *W.* 4. *c.* 59, *s.* 19, *the* 2 & 3 *W.* 4, *c.* 125, *s.* 64, *the* 5 & 6 *W.* 4, *c.* 45, *s.* 12, *and the* 5 & 6 *W.* 4. *c.* 51, *s.* 5, *whereby certain forgeries therein particularly mentioned were made capitally punishable; (see them stated, post, p.* 396); and enacts, that if any person shall, after the commencement of this act (1 Oct. 1837), be

convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

Sect. 2—*Commutation of Punishment of Transportation for Life*] —*Recites the* 2 *&* 3 *W.* 4, *c.* 123, *s.* 1, (*ante, p.* 359), 3 *&* 4 *W.* 4, *c.* 44, *s.* 3, (whereby the offenders were subjected to imprisonment before transportation for life), *and also the* 3 *&* 4 *W.* 4, *c.* 51, *s.* 27, (*see post, p.* 395); and enacts, that so much of the three lastly hereinbefore in part recited acts as relates to the punishment of persons convicted of offences for which they are liable under the said act of 2 *&* 3 W. 4, or 3 *&* 4 *W.* 4, to be transported for life, shall, from and after the commencement of this act, be and the same is hereby repealed; and that, from and after the passing of this act, every person convicted of any of such offences shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 26—*Place and Mode of Imprisonment for Forgery*]—Enacts, that where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet. [*But see* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, *ante, p.* 169.]

7 *W.* 4 *&* 1 *Vict. c.* 84, *s.* 3]—Enacts, that when any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

*Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M. labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, feloniously did forge a certain [*here name the instrument*] which said forged —— is as follows: that is to say, [*here set out the instrument verbatim* (*see ante, p.* 45)] with intent to defraud one J. N.; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*) And the jurors aforesaid, upon their oath

aforesaid, further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid in the county aforesaid, feloniously did forge a certain other [*state the instrument forged as in an indictment for a larceny of the instrument,* 2 *&* 3 *W.* 4, *c.* 123, *s.* 3, (*ante, p.* 350)] with intent to defraud the said J. N.; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*3rd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of and put off, a certain other forged ——, which said last-mentioned forged —— is as follows: that is to say, [*here set out the instrument verbatim*], with intent to defraud the said J. N., (he the said J. S. at the time he so uttered and published the said last-mentioned forged —— as aforesaid, then and there well knowing the same to be forged); against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*4th Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off a certain other forged [*as in the second count*], with intent, &c. [*as in the last count.*] *As to the venue in forgery, see ante, pp.* 19, 350. *Where the prisoner is tried in the county where he is in custody, under the* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 25, *the forgery may be alleged to have been committed in that county, and there need not be any averment that the prisoner is in custody there. R.* v. *James,* 7 *C. & P.* 553. *The offence of forgery is not triable at any quarter sessions, or before any recorder.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*This indictment is not intended as a general precedent to serve in all cases of forgery; because the form in each particular case must depend upon the statute on which the indictment is framed. But with the assistance of it, and upon an attentive consideration of the operative words in the statute creating the offence, the pleader can find no difficulty in framing an indictment in any case not particularly mentioned hereafter in this section.*

*The forgery should, in prudence, be alleged in the words of the statute on which the indictment is framed; but if the indictment contain the operative words of the statute, the insertion of other terms also will not vitiate it. R.* v. *Brewer,* 6 *C. & P.* 363. *Where an indictment contained two counts, the one for uttering a forged bill of exchange, and the other stating that the prisoner, having in his custody a certain bill of exchange with a forged acceptance thereon, feloniously did offer, &c., (then and there knowing the said acceptance to be forged), the said bill of exchange, and the evidence proved the acceptance only to be forged; it was objected that the statute mentions both the bill and acceptance, and therefore the forgery of the bill could not include that of the acceptance, and that the second count did not contain an express averment that the prisoner uttered the forged acceptance; the prisoner was convicted, but the judges held the conviction to be wrong. R.* v. *Horwell,* 1 *Mood. C. C.* 405; 6 *C. & P.* 148. *If the forgery consist of the alteration of a true instrument, the alteration may either be specially alleged, (and this mode is advisable, at least in one set of counts, even where the word "alter" is not in the statute; R.* v. *Elsworth,* 2 *East, P. C.* 986, 988); *or the*

*alteration may be given in evidence under, and will support, a count charging the forgery of the entire instrument. (See post, in the Evidence).*

*Before the late statute,* 2 *&* 3 *W.* 4, *c.* 123, *great care was necessary in setting out the instrument forged; but that statute renders it unnecessary to set forth any copy or fac simile of the instrument forged or uttered, and declares that it shall be sufficient to describe it in the same manner as in an indictment for stealing the instrument: and this statute has been held to apply even to instruments which are not the subjects of larceny, either at common law or by statute; as a receipt, Reg.* v. *Vaughan,* 8 *C. & P.* 276: *Reg.* v. *Boardman,* 2 *M. & Rob.* 147: *or a request for the delivery of goods; Reg.* v. *Robson,* 9 *C. & P.* 423, 2 *Mood. C. C.* 182. *Therefore, a promissory note, bill of exchange, &c., may be described as "a certain promissory note for the payment of* 50*l.," without stating any value; see R.* v. *Burgess,* 7 *C. & P.* 490: *R.* v. *James, Id.* 553: *so, a deed is sufficiently described by stating the date and parties, and as "purporting to be a lease of certain premises therein mentioned;" Reg.* v. *Davies,* 2 *Mood. C. C.* 177; 9 *C. & P.* 427; *see Reg.* v. *Collins,* 2 *M. & Rob.* 461. *Where the indictment, in setting out the forged instrument, also set out the attestation at the foot of it, as part of the instrument, but it appeared in evidence, that when the defendant subscribed the instrument, the attestation was not written on it; it was holden, nevertheless, to be no variance. R.* v. *Dunn,* 2 *East, P. C.* 976. *The indictment must state what the instrument is, in respect of which the forgery was committed. R.* v. *Wilcox, R. & R.* 50. *And the instrument must be correctly described; for instance, if a bill of exchange be described as a promissory note, the defendant will be acquitted. See R.* v. *Hunter, R. & R.* 511: *R.* v. *Birkett, Id.* 251. *Where the forged instrument is actually within the meaning of the statute on which you intend framing your indictment, but does not sufficiently appear to be so on the face of it, you must, if the instrument be set out, not only set out a literal copy of it in the indictment, but must also add such averments of extrinsic facts as may be necessary to make it appear upon the face of the record, that the forged instrument is one of those intended by, and described in the statute. Thus, for instance, where, by the usage of a public office, the bare signature of a party upon a navy bill operated as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged "a certain receipt for money, to wit, the sum of twenty-five pounds, mentioned and contained in the said paper called a navy bill, which forged receipt was as follows: that is to say,—'William Thornton, William Hunter,'" was holden bad, because it did not shew, by proper averments, that these signatures imported a receipt. R.* v. *Hunter,* 2 *Leach,* 624; 2 *East, P. C.* 928. *So, where an indictment charged the defendant with forging a receipt in the handwriting of Henry Hargreaves, as thus:—"Received H. H.," it was holden that the indictment was bad, because there was nothing to shew what H. H. meant. R.* v. *Barton,* 1 *Mood, C. C.* 141. *But where, upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus—"*8*th March,* 1773. *Received the contents above by me Stephen Withers," without setting out the account at the foot of which it was written, it was holden sufficient. R.* v. *Testick,* 1 *East,* 181, *n.; (see ante, p.* 46). *So the words, "Settled, Sam. Hughes," written at the foot of a bill of parcels, were held of themselves to import a receipt of acquit-*

*tance, and that no averment was necessary that the word "settled" meant a receipt or acquittance.* R. v. *Martin*, 1 *Mood. C. C.* 483; 7 *C. & P.* 549; *overruling R.* v. *Thompson*, 2 *Leach*, 910. *And see R.* v. *Houseman*, 8 *C. & P.* 180: *Reg.* v. *Vaughan*, *Id.* 276: *Reg.* v. *Boardman*, 2 *M. & Rob.* 147. *However, it has been before observed, that it is now unnecessary to set out the instrument; but these cases are still applicable if the instrument be set out. See Reg.* v. *Rogers*, 9 *C. & P.* 41.

*The intent to defraud is described as an ingredient of the offence, in all the statutes upon the subject of forgery, and must consequently be charged in the indictment. Where the intent mentioned in the statute is to defraud any particular corporation, &c., it must, of course, be so laid in the indictment. But where the intent is described generally to defraud any person or persons, it is prudent in the indictment to charge the offence, in different counts, to have been committed with intent to defraud each of the persons, partnerships, or corporations that might have been defrauded by it if the forgery had succeeded. The intent mentioned in the statute* 11 *G.* 4, *&* 1 *W.* 4, *c.* 66, *is to defraud "any person whatsoever," and the word "person" comprehends the King, foreign princes and states, bodies corporate, companies, and societies of persons not incorporated, and any person or number of persons who may be intended to be defrauded, whether they reside in England or elsewhere; and the indictment upon this statute may name one only of such company, society, or number of persons, and allege the offence to have been committed with intent to defraud the persons so named, and another or others, as the case may be.* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 28.

*As to the second count, for knowingly uttering the forged instrument, it is usual and prudent to add it in every case, lest the prosecutor should fail in proof of the actual forgery. But the forgery is of itself an offence, although the forged instrument have never been uttered. See R.* v. *Elliot*, 1 *Leach*, 173; *and see* 2 *Id.* 987; *R.* v. *Crocker*, *R. & R.* 97. *It is not necessary to aver to whom the instrument was disposed of. R.* v. *Holden*, *R. & R.* 154; 2 *Taunt.* 334; 2 *Leach*, 1019.

*Some other points relating to the indictment will be seen under the following head, of evidence.*

## *Evidence.*

*Forge, &c.*]—Proof of the altering of a part of a genuine instrument will support an indictment charging the defendant with having forged the instrument itself. As, for instance, where the indictment charged the defendant with having made, forged, and counterfeited a bill of exchange, the judges held that evidence of his having altered the bill, which was originally for ten pounds, so as to make it appear to be a bill for fifty pounds, supported the indictment; even although the statute, on which the indictment was framed, contained the word "alter" as well as the word "forge." *R.* v. *Teague*, 2 *East*, *P. C.* 979; *R. & R.* 33: *see R.* v. *Atkinson*, 3 *C. & P.* 669. It is more usual, however, and perhaps more prudent, at least to one set of counts, to charge it as an alteration merely, and to allege the alteration specially. But there is no doubt that any the slightest alteration of a genuine instrument in a material part, whereby a new operation is given to it, is a forgery; as, for instance, making a lease of the manor of *Dale* appear to be a lease of the manor of *Sale*, by changing the D to S; 1 *Hawk. c.* 70, *s.* 2; making a bill

of exchange for eight pounds appear to be for eighty pounds, by adding a cypher to the 8; *R.* v. *Elsworth*, 2 *East, P. C.* 986, 988; altering a banker's one pound note, by substituting the word ten for the word one; *R.* v. *Post, R. & R.* 101; even altering the notes of a country banker, as to the place at which they were made payable in London, has been holden to be forgery. *R.* v. *Treble*, 2 *Taunt.* 328; *R. & R.* 164.

But where the forgery is of a mere addition to the instrument, and which has not the effect of altering it, but is merely collateral to it; as, for instance, a forged acceptance or indorsement to a genuine bill of exchange; proof of the forgery of the addition will not support an indictment charging the forgery of the entire instrument: the forgery of such addition must be specially alleged, and must be proved as laid. *See R.* v. *Birkett, R. & R.* 251. Forging the signature of the drawer to a bill of exchange, however, is the same precisely as forging the entire bill, and may be laid as such. Where an illiterate woman of the name of Dunn represented herself to the prosecutor as the widow of a deceased seaman of the name of Wallace, and obtained from him a loan of money upon her promissory note: the note was written by the prosecutor, and upon his asking her what name he should put to it, she answered, "Mary Wallace;" he thereupon subscribed the name "Mary Wallace" to the note; and she affixed her mark in the usual place, between the christian and surname: the judges held this to be a forgery of the note. *R.* v. *Dunn*, 1 *Leach*, 57. And whether the name forged be that of a merely fictitious person, who never existed, or of a person actually existing, is wholly immaterial; it is as much a forgery in the one case as in the other; *R.* v. *Lewis, Fost.* 116: *R.* v. *Wilks*, 2 *East, P. C.* 957: *R.* v. *Bolland, Ib.*: *R.* v. *Lockett*, 1 *Leach*, 94: *R.* v. *Parkes*, 2 *Leach*, 775; 2 *East, P. C.* 963: *R.* v. *Froud*, 1 *B. & B.* 300; *R. & R.* 389: *R.* v. *Sheppard*, 1 *Leach*, 226: *R.* v. *Whiley*, 2 *Id.* 983; *R. & R.* 90: *R.* v. *Francis, R. & R.* 209: *and see R.* v. *Webb*, 3 *B. & B.* 228; *R. & R.* 405: *R.* v. *Watts, R. & R.* 436; provided the fictitious name be assumed for the purpose of fraud, in the particular instance in question. *R.* v. *Bontien, R. & R.* 260. So, also, the signing a bill of exchange in the name of a non-existing *firm*, or in the defendant's own name to represent a fictitious firm, with intent to defraud, is forgery. *Reg.* v. *Rogers*, 8 *C. & P.* 629. But it is not forgery fraudulently to induce a person to execute an instrument, on a misrepresentation of its contents. *Reg.* v. *Collins*, 2 *M. & Rob.* 461; or to procure his signature to a document, the contents of which have been altered without his knowledge. *Reg.* v. *Chadwick, Id.* 545.

Even where a man, upon obtaining discount of a bill, indorsed it in a fictitious name, when he might have obtained the money as readily by indorsing it in his own name, it was holden to be a forgery. *R.* v. *Taft*, 1 *Leach*, 172: *and see R.* v. *Taylor*, 1 *Leach*, 214: *R.* v. *Marshall, R. & R.* 75: *R.* v. *Whiley, R. & R.* 90: *R.* v. *Francis, R. & R.* 209. But if a man who has been long known by a fictitious name, draw a bill in that name, it will not be a forgery. *See R.* v. *Aickles*, 2 *East, P. C.* 968: *R.* v. *Bontien, R. & R.* 260. Or if a man pass himself off as the indorser of a bill, when in fact he is not so, but the indorsement is genuine; this cannot be deemed forgery, even although it be done for purposes of fraud, and in concert with the real indorser. *R.* v. *Hevey*, 1 *Leach*, 229; 2 *East, P. C.* 856. Where a man drew

a bill on Williams & Co., bankers, 3, Birchin Lane, London, and at the time he paid away the bill he was asked if the drawers were Williams, Burgess, & Co., the London bankers, and he answered in the affirmative; the bill was presented, not at Williams, Burgess, & Co., who lived at No. 20 in the same street, but at a counting-house, No. 3, where the words "*Williams & Co.*" were on a brass plate on the door, and it was there accepted in the name of "*Williams & Co.*:" proof was given at the trial that the acceptance was not that of Williams, Burgess, & Co., and that there were no other London bankers of that name: the prisoner was convicted; but, upon the point being afterwards argued before the judges, ten of them held that it was not a forgery. *R.* v. *Watts*, 3 *B. & B.* 197; *R. & R.* 436. But if a bill, payable to J. S. or order, get into the hands of another person of the same name, and he indorse it, it will be a forgery. *Mead* v. *Young*, 4 *T. R.* 28. It is forgery for a person, having authority to fill up a blank acceptance for a certain sum, to fill up the bill for a larger sum. *R.* v. *Minter Hart*, 1 *Mood. C. C.* 486; 7 *C. & P.* 652. And if a party put the name of another to a bill of exchange without his authority, it is equally a forgery, although the party expected to be able to meet it when due. *R.* v. *Forbes*, 7 *C. & P.* 224: *see Reg.* v. *Hill*, 8 *C. & P.* 274: *Reg.* v. *Cooke*, *Id.* 582.

If several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. *R.* v. *Bingley*, *R. & R.* 446. As, if B. make the paper, C. engrave the plate, and D. fill up the instrument, each without knowing that the others are employed for that purpose, they are all principals. *R.* v. *Dade*, 1 *Mood. C. C.* 307: *R.* v. *Kirkwood*, *Id.* 304. So, if several concur in employing another to make a forged instrument, knowing its nature, they are all guilty of the forgery. *Reg.* v. *Mazean*, 9 *C. & P.* 676.

That the signature or other part of the instrument alleged to be forged is not of the handwriting of the party, may be proved by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him. (*Ante*, *p.* 140). It is sufficient, primâ facie, to disprove his handwriting, and he need not be called to disprove an authority to others to use his name; circumstances shewing guilty knowledge are enough. *Reg.* v. *Harley*, 2 *M. & Rob.* 473. We have seen (*ante*, *p.* 146) that the party himself whose name is forged may be a witness to prove the forgery. But the forgery may equally be proved by other witnesses who are acquainted with his handwriting, without calling him as a witness; his testimony as to the fact of forgery is not deemed the best evidence, and that of other persons merely secondary. *R.* v. *Hughes*, 2 *East*, *P. C.* 1002: *R.* v. *Macguire*, *Ib.*; *R. & R.* 378. It seems to be doubtful whether the forgery can be proved by the examination of persons of skill, as to the handwriting being genuine or an imitation, from its appearance. *Goodtitle* v. *Braham*, 4 *T. R.* 497: *Carey* v. *Pitt*, *Peake*, *Add. Ca.* 130: *R.* v. *Cator*, 4 *Esp.* 117: *Gurney* v. *Longlands*, 5 *B. & Ald.* 330; (*see ante*, *p.* 141). On an indictment for uttering a forged will, which, it was alleged, had been written over pencil marks that had been rubbed out, it was held that the evidence of engravers, who had examined the paper with a mirror and traced the pencil marks, was admissible for the prosecution. *Reg.* v. *Thomas Williams*, 8 *C. & P.*

434. Evidence must also be given of the identity of the party whose handwriting is alleged to be forged; that is, it must be proved expressly or from circumstances, that the alleged forgery was intended to represent the handwriting of the person whose handwriting it is proved not to be; or that it was attempted to be uttered as the handwriting of a person who never existed. (*Ante, p.* 359). *See R.* v. *Sponsonby*, 2 *East, P. C.* 996, 997: *R.* v. *Downes, Id.* 997. Where the defendant uttered a forged note, and said that it was drawn by W. H. of the Bull's Head, it was holden to be sufficient to prove that it was not of the handwriting of that W. H., although it appeared that there was another W. H. living in the neighbourhood. *R.* v. *Hampton*, 1 *Mood. C. C.* 255. Where the prisoner obtained money from B. for a cheque on Jones, Loyd, & Co., purporting to be drawn by G. Andrews in favour of —— Newman, esq., or bearer, telling him that it was for Mr. Newman of Soho Square, in whose service he had been for three months, and that Mr. Newman had put his name on the back; and it appeared, upon an indictment for forging and uttering the cheque that no person of the name of G. Andrews kept an account with Jones, Loyd, & Co., that Mr. Newman of Soho Square did not write his name on the back of the cheque, and that the prisoner was never in that gentleman's service:—*Parke*, J., (after consulting *Gaselee*, J.), held this to be sufficient *primâ facie* evidence that G. Andrews was a fictitious person, and told the jury that if G. Andrews really drew the cheque, the prisoner might produce him, or give some evidence upon the subject: the prisoner was convicted. *R.* v. *Backler*, 5 *C.* & *P.* 118. Upon an indictment for forging and uttering a bill of exchange, purporting to be drawn by T. W. of Nottingham and to be accepted by T. K., Market Place, Birmingham, which was passed to the prosecutor by the prisoner, who represented his name to be King, of King Square, which he said was chiefly his property; the prosecutor proved that he had made inquiry for T. W. at Nottingham, and could not find him; that he had been twice to Birmingham after T. K., but could find no such person, and that he had made inquiries at King Square for the prisoner, but could hear of no such person: but he admitted that he was a stranger at these places, and no person acquainted with them was called:—*Parke*, J., after consulting the judges present, held this sufficient evidence to go to the jury of the bill being a fictitious one, although he told them that it was not very satisfactory, and not the usual evidence upon such occasions. *R.* v. *King*, 5 *C.* & *P.* 123. Where the prisoner was indicted for forging and uttering a cheque on Greenwood & Co., army agents and bankers, purporting to be drawn by J. Weston, and a clerk in the army department was called to prove that J. Weston kept no account with his employers; he also admitted that he did not know the names of all the customers, but added, that he knew of no customer named J. Weston, and that, upon inquiry of the other clerks, he found that there was no such person:—*Parke*, J., with the concurrence of *Patteson*, J., and *Gurney*, B., held this to be *primâ facie* evidence, sufficient to call upon the prisoner to shew who J. Weston really was. *R.* v. *Brannan*, 6 *C.* & *P.* 326.

It was at one time doubted whether the forgery of an instrument in this country, payable abroad, or the uttering of an instrument in this country, forged and payable abroad, was an offence within some

of the repealed statutes; *see R.* v. *Dick*, 1 *Leach*, 68: *R.* v. *M'Kay*, *R. & R.* 71; although it was afterwards decided that it was. *R.* v. *Kirkwood*, 1 *Mood. C. C.* 311. But these doubts were removed by the statute 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 30, (*ante*, *p.* 351), which makes it an offence, punishable in the same manner as if the instrument were made or purported to be made, or the money were payable or purported to be payable, in this country, to forge or alter, or knowingly offer, utter, dispose of, or put off in this country any instrument or writing, the forgery, &c. of which is punishable by that act, in whatsoever place it may be made, or purport to be made, or to forge &c., or knowingly offer, &c., in this country, any bill of exchange or promissory note for the payment of money, or any indorsement or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money, (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), in whatever place out of England the money payable or secured thereby may be or may purport to be payable.

*Which said forged —— is as follows, &c.*]—The instrument, if set out, must, when given in evidence, correspond exactly with that set out in the indictment; the slightest variance will be fatal. (*Ante*, *p.* 102). A mere literal variance, indeed, (that is, where the omission or addition of a letter does not alter or change a word, so as to make it another word, 2 *Salk.* 661; *Cowp.* 229), will not be material; as, for instance, "receivd" for "received;" *R.* v. *Hart*, 1 *Leach*, 145; 2 *East*, *P. C.* 977; "undertood" for "understood," *R.* v. *Beach*, *Cowp.* 229; "Messes." for "Messrs.," *R.* v. *Oldfield*, 2 *Russ.* 376, or the like. (*Ante*, *p.* 102). It is not, however, now necessary that the instrument should be set out in the indictment; 2 & 3 *W.* 4, *c.* 123, (*ante*, *p.* 350); and, in order to avoid a variance, a count should always be framed upon this provision.

Sewing to the parchment on which the indictment is written impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment. *R.* v. *Harris*, *R.* v. *Moses*, *R.* v. *Balls*, 7 *C. & P.* 429: *R.* v. *Warshaner*, 1 *Mood. C. C.* 466. If the instrument forged be in a foreign language, it must be set out in that language, and a complete and accurate translation must also be set out. *See R.* v. *Szudurskie*, 1 *Mood. C. C.* 419: *R.* v. *Warshaner*, *Id.* 466: *R.* v. *Harris*, 7 *C. & P.* 416, 429. But counts under the 2 & 3 *W.* 4, *c.* 123, *s.* 3, stating the plates to have engraved on them, in the Polish language, a promissory note for the payment of money, to wit, for the payment of five florins, purporting to be a promissory note for payment of money of a certain foreign prince, without stating the value, were held good after verdict, by virtue of 7 *G.* 4, *c.* 64, *s.* 21. *R.* v. *Warshaner*, *R.* v. *Harris*, *supra.*

The instrument must appear, upon the face of it, to have been made to resemble a true instrument of the denomination mentioned in the indictment, and in the statute upon which it is framed, so as to be capable of deceiving persons using ordinary observation, according to their means of knowledge, *see R.* v. *Colilcot*, 2 *Leach*,

1048; 4 *Taunt.* 300; *R. & R.* 212, 229: *R.* v. *Jones*, 1 *Leach*, 204, although not, perhaps, those scientifically acquainted with such instruments. *See R.* v. *Hoost*, 2 *East*, *P. C.* 950. Even where, upon an indictment for forging a bank note, there appeared to be no watermark in the forged note, and the word "pounds" was omitted in the body of it, the defendant being convicted, the judges held the conviction to be right. *R.* v. *Elliot*, 1 *Leach*, 175. So where the defendant was indicted for forging the will of *Peter* Perry, and the will produced in evidence commenced "I, *Peter* Perry," but was subscribed "*John* Perry, his mark;" but it was also stated in evidence, that upon this repugnancy, being remarked to the prisoner, he said that he had by mistake written "*John*" instead of "*Peter*," and that the mark was that of Peter Perry; the defendant was convicted and executed. *R.* v. *Fitzgerald*, 1 *Leach*, 20. But, if, on the other hand, the instrument do not appear to be such as probably might be imposed upon persons to whom it was likely to be uttered as a true instrument of the denomination mentioned in the indictment, the defendant must be acquitted. Where the defendant was indicted for forging a will of lands, and the will produced was attested (before the stat. 1 *Vict. c.* 26) by two witnesses only, the judges held that the defendant could not be convicted, although it did not appear, either in evidence or upon the face of the will, whether the lands were freehold or not; for they must be presumed to be freehold, unless the contrary appeared. *R.* v. *Wall*, 2 *East*, *P. C.* 953. So, a bill of exchange for three guineas, not attested as required by stat. 17 *G.* 3, *c.* 30, *s.* 1, was holden by the judges not to be the subject of an indictment for forgery, as a bill of exchange; because, if it were a genuine instrument, it would be absolutely void for want of the attestation. *R.* v. *Moffat*, 1 *Leach*, 431. So, a bill of exchange or country bank note, which, for want of a signature, is incomplete, or a navy bill payable to —— or order, *R.* v. *Richards*, *R. & R.* 193: *R.* v. *Randall*, *Id.* 195: *R.* v. *Pateman*, *R. & R.* 455: *Reg.* v. *Butterwick*, 2 *M. & Rob.* 196, is not the subject of an indictment for forgery. *See R.* v. *Burke*, *R. & R.* 496. But a man may be convicted of forging a will, although it appear in evidence that the pretended testator is alive; *R.* v. *Sterling*, 1 *Leach*, 99: *R.* v. *Coogan*, *Id.* 499; for the instrument, if genuine, would be a will, notwithstanding the testator were still alive; his death would merely give effect to the instrument. So, a man may be indicted for forging and uttering a bill of exchange, although the name of the payee was not indorsed on it; *R.* v. *Wicks*, *R. & R.* 149; or even although the bill were not stamped. *R.* v. *Hawkeswood*, 2 *T. R.* 606; 1 *Leach*, 257; (*ante*, *p.* 141): *R.* v. *Reculist*, 2 *Leach*, 703. So, a man may be indicted for forging an instrument, which, if genuine, could not be made available, by reason of some circumstance not appearing upon the face of the instrument, but to be made out by extrinsic evidence. *See R.* v. *M'Intosh*, 2 *Leach*, 883; 2 *East*, *P. C.* 942. Thus, a man may be indicted for forging a deed, though not made in pursuance of the provisions of particular statutes, requiring it to be in a particular form: *R.* v. *Lyon*, *R. & R.* 255: *R.* v. *Froud*, *Id.* 389; 1 *B. & B.* 300: or for forging a cheque, though it be postdated. *Reg.* v. *Taylor*, 1 *C. & K.* 213.

*With intent to defraud J. N.*]—It is not necessary to prove that

J. N. was actually defrauded by the forgery; *R.* v. *Crooke*, 2 *Str.* 901: *R.* v. *Goate*, 1 *Ld. Raym.* 737; if, from circumstances, the jury can presume that it was the defendant's intention to defraud J. N.,—if in fact J. N. might have been defrauded if the forgery had succeeded,—it is sufficient to satisfy this allegation in the indictment; for where the intent to defraud exists in the mind of the defendant, it is sufficient, though, from circumstances of which he is not apprised, he could not in fact defraud the prosecutor; *R.* v. *Holden*, *R. & R.* 154; even though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him. *R.* v. *Sheppard*, *R. & R.* 168: *see R.* v. *Harvey*, 2 *B. & C.* 261. Where a forged bill of exchange, payable to the order of the defendant, was given as a pledge only, but to obtain credit, it was holden to be a fraudulent intent within the meaning of the statute. *R.* v. *Birkett*, *R. & R.* 86. A jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him; and although the object was general, to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine, did not enter into the prisoner's contemplation. *R.* v. *Mazagora*, *R. & R.* 291. A forged cheque drawn on the Worcester old bank was presented by the prisoner to Rufford's bank at Stourbridge, and refused; and upon an indictment for forging and uttering the cheque with intent to defraud the Messrs. Rufford, it was objected, that as it was not drawn upon them, it could not defraud them; but *Bosanquet*, J., held, that, as it was presented at their bank for payment, it was evidence of an intent to defraud them. *R.* v. *Crowther*, 5 *C. & P.* 316. The fact that the prisoner has given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, does not so completely negative an intent to defraud them as to withdraw the case from the consideration of the jury. *R.* v. *James*, 7 *C. & P.* 153: *see Reg.* v. *Cooke*, 8 *C. & P.* 582.

The words "with intent," &c., apply to the verb to which the prisoner's name is the nominative; therefore, a count which states that the prisoner "did forge" a promissory note for 50*l.*, "on which said promissory note is an indorsement as follows: C. J.,— with intent to defraud J. S.," sufficiently charges that the forged note, and not the indorsement, was the thing whereby the prisoner intended to defraud J. S. *R.* v. *James*, *supra*.

On the trial of an indictment for forgery with intent to defraud A. B., "one of the public officers" of a banking company established under 7 *G.* 4, *c.* 46, A. B. stated that he was the public officer, and an examined copy of the return forwarded to the stamp-office under that act, in which also he was stated to be so, was put in: but this copy had not the affidavit at the close of the return, which is directed by schedule A. of that statute, and the date was left blank. The judges held that A. B. was sufficiently proved to be the public officer. *Reg.* v. *Carter*, 1 *C. & K.* 741: *see Edwards* v. *Buchanan*, 3 *B. & Adol.* 788.

## 2nd Count.

*Offer, utter, dispose of, and put off, &c.*]—To offer and utter mean nothing more than that the party tendered, or attempted to pass or make use of the forged instrument, with the intent charged in the indictment; these words do not import that the person to whom the forged instrument was tendered actually accepted it with intention to retain it, or was defrauded by it. Accordingly we find that the legislature, wherever they intended that the offence should not be complete without an acceptance on the one part and a relinquishment on the other, have described the offence in words of a different and appropriate meaning, such as "pay and put off," (*see* 1 *East, P. C.* 179), or the like. But in stat. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, (which is the act of most general importance upon the subject of forgery, extending to deeds, wills, bonds, bills of exchange, and promissory notes, warrants, or orders for the payment of money or delivery of goods, acquittances and receipts for money or goods, and accountable receipts for notes, bills, or other securities for money), the offence of uttering, &c., is described by the words "offer, utter, dispose of, or put off," which include attempts to make use of a forged instrument, as well as cases where the defendant has actually succeeded in making use of it. Where, on an indictment upon the repealed statute 13 *G.* 3, *c.* 79, which contained the words "utter or publish," it appeared that the defendant shewed a forged instrument to a person, with intent to raise a false idea of his substance, and afterwards left the instrument under cover, in the custody of that person, it was holden not to be an uttering or publishing within these words. *R.* v. *Shukard, R. & R.* 200. But the shewing of a forged *receipt* to a person with whom the defendant is claiming credit for it, is an uttering within the 1 *W.* 4, *c.* 66, *s.* 10, though the defendant refuse to part with the possession of it. *Reg.* v. *Radford,* 1 *C. & K.* 707.

Questions have arisen upon the subject of uttering, as to the quality of the offences of different parties, viz. whether they were indictable as principals or accessaries. It has been decided, that the giving of a forged note to an innocent agent, or to an accomplice, that he may utter it, is a disposing of and putting away of the note. *R.* v. *Palmer,* 1 *N. R.* 96; *R. & R.* 72: *R.* v. *Giles,* 1 *Mood C. C.* 166. But were several, by concert, are privy to the uttering of a forged note, which is uttered by one only, in the absence of the others, (*see ante, p.* 4), he only who utters it is a principal, but the others are accessaries before the fact. *R.* v. *Soares, R. & R.* 25: *R.* v. *Badcock, Id.* 249: *R.* v. *Stewart, Id.* 363: *R.* v. *Davis, Id.* 113: *see R.* v. *Morris, Id.* 270; 2 *Leach.* 1096: *R.* v. *Harris,* 7 *C. & P.* 416.

To maintain this count, it will be sufficient to prove that the defendant sold or disposed of the forged instrument. The words of the statute, 1 *W.* 4, *c.* 66, are, "offer, utter, dispose of, or put off," and the words of the section applicable to the buyer are, "purchase or receive," (*s.* 12, *post, p.* 387). Where the words of the statute are only "utter and publish as true," the instrument must have been uttered as true, and not sold or disposed of as a forged instrument.

A *conditional* uttering is as much a crime as any other. Where the defendant gave a forged acceptance, knowing it to be so, to the manager of a bank where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the money he owed

them, and the manager replied that that would depend on the result of inquiries as to the acceptors: this was holden a sufficient guilty uttering. *Reg.* v. *Cooke*, 8 *C. & P.* 582.

*A certain other false, &c.*]—This must be proved as in the first count. (*See ante, p.* 358).

*With intent to defraud J. N.*]—this is also proved as on the count for forgery. (*See ante, p.* 363). If, however, the jury are satisfied that the prisoner uttered the instrument as true, meaning it to be taken as such and that he knew it to be forged, they are bound to infer the intent to defraud. *Reg.* v. *Hill*, 8 *C. & P.* 274: *Reg.* v. *Vaughan*, *Id.* 276: *Reg.* v. *Cooke*, *Id.* 582, 586: *Reg.* v. *Geach*, 9 *C. & P.* 499. H. employed L. to do work for him: L. had a partner S., who took no active part in the business, which H. knew. H. knowingly paid L. for the work by a forged bill of exchange, which L. indorsed in his own name only, and delivered to S., who also indorsed it in his own name and negotiated it. H. was held to be properly convicted on a count charging an uttering with intent to defraud L. only. *Reg.* v. *Hanson*, 2 *Mood. C. C.* 245; *C. & Mar.* 334.

*Well knowing the same to be forged.*]—This is not capable of direct proof. It is nearly in all cases, therefore, proved by evidence of facts from which the jury may presume it. Upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, proof that the defendant has passed other forged notes, if proved by legitimate evidence, *R.* v. *Millard*, *R. & R.* 245, raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; *R.* v. *Wylie*, 1 *N. R.* 92: *R.* v. *Tattersal*, *Id.* 94, *n.*; *ante, p.* 104; *and see R.* v. *Ball*, 1 *Camp.* 324; *R. & R.* 132: *R.* v. *Hough*, *R. & R.* 120; and if, in addition to this, it be proved that the defendant, when he passed these notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge. (*See ante, p.* 123). It has been ruled, however, that if a subsequent uttering be made the subject of a distinct indictment, it cannot be given in evidence to shew a guilty knowledge in a former uttering. *R.* v. *Smith*, 2 *C. & P.* 633: *and R.* v. *Smith*, 4 *C. & P.* 411. The propriety of this distinction may however be questioned; and in a case of *Reg.* v. *Cadwallader Lewis*, *Carnarvon Summ. Ass.* 1840, Lord *Denman*, C. J., said, that "he could not conceive how the relevancy of the fact to this charge could be affected by its being the subject of another charge," and offered to admit the evidence, although the above cases were cited. And in another recent case, *Alderson, B.*, admitted such evidence. *Reg.* v. *Acton*, 1 *Russ.* 407. On an indictment under the 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 19, for engraving or uttering notes of a foreign prince, evidence of a recent engraving or uttering notes of another foreign prince is admissible in proof of a guilty knowledge. *R.* v. *Balls*, 1 *Mood. C. C.* 470; 7 *C. & P.* 429.

The defendant's statements as to other instruments of the same kind, supposed to have been the subject of a guilty uttering by him, are not, however, admissible in evidence. *Reg.* v. *Cooke*, 8 *C. & P.* 582.

COUNTERFEITING THE GREAT SEAL, &c.

### *Statute.*

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 2]—Enacts, that if any person shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, his Majesty's privy seal, any privy signet of his Majesty, his Majesty's royal sign manual, any of his Majesty's seals appointed by the twenty-fourth article of the Union to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, every such offender shall be guilty of high treason, and shall suffer death accordingly; provided always, that nothing contained in an act passed in the seventh year of the reign of King William the Third, intituled "*An Act for regulating of Trials in Cases of Treason and Misprision of Treason,*" or in an act passed in the seventh year of the reign of Queen Anne, intituled "*An Act for the improving the Union of the Two Kingdoms,*" shall extend to any indictment, or to any proceedings thereupon, for any of the treasons hereinbefore mentioned.

### *Indictment.*

*Commencement as ante, p.* 355]—in the county aforesaid, the great seal of the United Kingdom, ("*the great seal of the United Kingdom, his Majesty's privy seal, any privy signet of his Majesty, his Majesty's royal sign manual, any of his Majesty's seals appointed by the twenty-fourth article of the Union to be kept and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland*"), falsely, deceitfully, feloniously, and traitorously did forge and counterfeit, against the duty of his allegiance, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, falsely, deceitfully, feloniously, and traitorously did utter a certain other false, forged, and counterfeited great seal as aforesaid, then and there well knowing the same to be false, forged, and counterfeited, against the duty of his allegiance, against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.—*Add counts stating the instrument to which the counterfeit seal was appended.*

*Treason,* 11 *G.* 4, *&* 1 *W.* 4, *c.* 66, *s.* 2, *transportation for life or for not less than seven years, or imprisonment not exceeding four nor less than two years,* 7 *W.* 4 *&* 1 *Vict, c.* 84, *s.* 2, (*ante, p.* 355), *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 355).

### *Evidence.*

To support the first count, produce the instrument to which the forged seal is appended, and prove by witnesses conversant with the genuine seal that the seal produced is counterfeited; then prove that

the prisoner counterfeited the seal, either by direct evidence, or by circumstances from which the jury may infer it.

To support the second count, prove the seal to be forged as above, and the uttering as directed *antc, p.* 365.

The statute applies to a forging of the impression of the seal, and not to a counterfeiting of the seal itself, which, though a high misdemeanor, is not treason. 1 *Hale,* 183. Where the prisoner forged the draught of a patent, and counterfeited the privy signet to it, and so obtained the great seal to the patent, and being indicted for counterfeiting the privy signet, it appeared that he had purposely introduced some things and words into the counterfeit signet which were not in the original, and had omitted others; the court held it to be treason. *Robinson's case,* 2 *Rol. Rep.* 50; 1 *Hale,* 184. The mere misuser of the great seal is not treason; 1 *Hale,* 183; 3 *Inst.* 15; as, for instance, the taking of the great seal from an original patent and appending it to a pretended patent. 37 *H.* 8; *Bro. Ab. Treason, pl.* 3; 1 *Hale,* 182: *Leak's case,* 12 *Co.* 15. So neither is the alteration of the instrument to which the real seal is appended treason, within the meaning of the act. 3 *Inst.* 15; 1 *Hale,* 183.

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FORGING AND UTTERING BANK-NOTES, WILLS, AND BILLS, &c.

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*Statutes.*

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 3]—Enacts, that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any Exchequer bill or Exchequer debenture, or any indorsement on or assignment of any Exchequer bill or Exchequer debenture; or any bond under the common seal of the united company of merchants of England trading to the East Indies, commonly called an East India bond or any indorsement on or assignment of any East India bond, or any note or bill of exchange of the governor and company of the Bank of England, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bill of exchange, or bank post bill, or any will, testament, codicil, or testamentary writing, or any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon. *See* 7 *W.* 4 *&* 1 *Vict. c.* 84, *s.* 1, (*ante, p.* 354).

**Sect. 4—*What shall be deemed a Will, Bill of Exchange, &c.*]—Declares and enacts, that where, by any act now in force, any person is made liable to the punishment of death for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such act by any special name or description, and such instrument or writing, however designated, is in law a will, testament, codicil, or**

testamentary writing, or a bill of exchange, or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange, or promissory note for the payment of money, or an acceptance of a bill of exchange, for an undertaking, warrant, or order for the payment of money, within the true intent and meaning of this act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this act, and punished with death accordingly.

*Indictment for forging and uttering a Bank Note.*

*Commencement as ante, p.* 355]—feloniously did forge ["*forge or alter*") a certain note of the governor and company of the Bank of England, commonly called a bank note, ("*any note or bill of exchange of the governor and company of the Bank of England, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on, or assignment of, any bank note, bank bill of exchange, or bank post bill*"),which said forged note is as follows; that is to say, [*here set out the bank note in words and figures correctly*], with intent to defraud the governor and company of the Bank of England; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off a certain other forged note of the governor and company of the Bank of England, commonly called a bank note, which said last-mentioned forged note is as follows; that is to say, [*here set out the bank note*], with intent to defraud the said governor and company of the bank of England, (he the said J. S., at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged note as aforesaid, then and there well knowing the same to be forged); against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity, (*3rd Count*). And the jurors, aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did forge a certain promissory note ("*any bill of exchange or promissory note for the payment of money, or any indorsement on, or assignment of, any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange*") for the payment of money, which said forged promissory note is as follows; that is to say, [*here set out the bank note*], with intent to defraud the said governor and company of the Bank of England; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*4th Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer utter, and dispose of, and put off a certain other forged promissory note for the payment of money, which said last-mentioned forged promissory note is as follows; that is to say, [*here set out the bank note*], with intent to defraud the said governor and company of the Bank of Eng-

land (he the said J. S., at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged promissory note as aforesaid, then and there well knowing the same to be forged); against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add another set of counts charging the forgery, &c., to have been committed with intent to defraud the person to whom the note was uttered or passed. Add also a set of counts describing the forged instrument in such manner as would sustain an indictment for stealing the same, 2 & 3 W. 4, c. 123, s. 3. (See ante, pp. 350, 357). In the counts for offering and disposing of the note, it is not necessary to allege to whom it was so offered, &c. R. v. Holden, 2 Taunt. 334; R. & R. 154.*

*An indictment for forgery on a joint-stock bank may lay the intent to have been to defraud "A. B. and others;" it need not be laid with intent to defraud the officers returned under the 7 G. 4, c. 46. R. v. Burgess, 7 C. & P. 490: R. v. James, Id. 553: R. v. Beard, 8 C. & P. 143. (See ante, p. 34.) But in the case of an indictment against a member of the copartnership, it would seem that the intent must be laid to defraud some one of the officers for the time being, in whose name an action might be brought. 3 & 4 Vict. c. 111, s. 2. See Reg. v. Atkinson, 2 Mood. C. C. 278; C. & Mar. 525; (ante, p. 34).*

*Felony. 11 G. 4 & 1 W. 4, c. 66, s. 3. See the last precedent.*

### *Evidence.*

Prove the forgery, as directed *ante, p.* 358 *et seq.* Under the counts for uttering, you may give in evidence that the defendant offered or tendered the note in payment, or that he actually passed it, or otherwise disposed of it, to another person. Where it appeared that the defendant sold a forged note to an agent employed by the bank to procure it from him, the judges held this to be within the act, although it was objected that the prisoner had been solicited to commit the act proved against him, by the bank themselves, by means of their agents. *R.* v. *Holden,* 2 *Taunt.* 334; *R. & R.* 154. So, where A. gave B. a forged note to pass for him, and upon B.'s tendering it in payment of some goods, it was stopped: the majority of the judges held that A., by giving the note to B., was guilty of disposing of and putting away the note, within the meaning of the act. *R.* v. *Palmer,* 1 *N. R.* 96; *R. & R.* 72: *R.* v. *Giles,* 1 *Mood, C. C.* 166; (*ante, p.* 365). As to evidence that the prisoner knew the note to be forged at the time he disposed of it, and as to the other evidence necessary to support these counts, *see ante, p.* 366.

By statute 1 *G.* 4, *c.* 92, *s.* 3, the Bank of England may cause the name of their signing clerk to be impressed upon their notes by machinery, and all bank notes on which the name of the person authorized by the bank to sign them shall be impressed by machinery, shall be good and valid to all intents and purposes as if such notes had been subscribed in the proper hand-writing of such person, and shall be deemed and taken to be bank notes, and may be described as such in all indictments, and in all criminal and civil proceedings whatsoever.

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### *Indictment for forging a Will.*

*Commencement as ante, p.* 355]—in the county aforesaid, feloniously did forge a certain will and testament, ("*any will, codicil, or testa-*

*mentary writing*"), which said forged will and testament is as follows; that is to say, [*here recite the will verbatim, including the attestations*], (*see ante, p.* 46), with intent to defraud one J. N.; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*) *That he* "did offer, utter, dispose of, and put off," *as in the precedent,* (*ante, p.* 356). *If it be a will of lands only, it should be charged to have been forged and uttered, &c., with intent to defraud the person who is heir-at-law; if of personal property only, the person who is next of kin to the deceased; if of real and personal property, the person who is heir-at-law in one set of counts, and the next of kin in another. And in all these cases, it may be prudent to add another set of counts, charging the will to have been forged and uttered,* "with intent to defraud such person and persons as would by law be entitled to the said several [*lands, tenements, and hereditaments, goods, chattels, and effects*], in the said pretended will mentioned as aforesaid." *In the former set of counts, it is not necessary to state that the person intended to be defrauded is heir-at-law or next of kin; for it is not necessary that it should appear upon the face of the indictment how he was to be defrauded; it is sufficient if that appear by the evidence. See R.* v. *Elsworth, 2 East, P. C.* 986. *You may, however, if you choose, add other sets of counts, charging the offence to have been committed with intent to defraud the* "heir-at-law" *and the* "next of kin," *generally. Add also counts describing the will in such manner as would sustain an indictment for stealing the same.* 2 *&* 3 *W.* 4, c. 123, *s.* 3, (*ante, p.* 350).

*Felony, transportation for life or for not less than seven years, or imprisonment not exceeding four nor less than two years,* 7 *W.* 4 *&* 1 *Vict. c.* 84, *s.* 1, (*ante, p.* 354), *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 355). *Where, by any statute now in force, any person is liable to the punishment of death for forging, &c., any instrument or writing, however designated in the act, he may be indicted and punished under this act, if the instrument, however designated, is in law a will, testament, codicil, or testamentary writing.* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 4, (*ante, p.* 368).

## *Evidence.*

Forgery may be committed by the false making of the will of a living person; *R.* v. *Murphy, 2 East, P. C.* 949: *R.* v. *Sterling,* 1 *Leach,* 99: *R.* v. *Coogan, Id.* 449; or of a non-existing person, *Reg.* v. *Avery,* 8 *C. & P.* 596. So, though it be signed with the wrong christian name of the person whose will it purports to be. *R.* v. *Fitzgerald,* 1 *Leach,* 20. *See R.* v. *Wall, 2 East, P. C.* 953; (*ante, p.* 363). The probate unrepealed is not conclusive evidence to bar an indictment for forging a will. *R.* v. *Buttery, R. & R.* 342.

Prove the forging and uttering, as directed *ante, p.* 358 *et seq.* Prove, also, that J. N. is heir-at-law or next of kin to the deceased; but if you fail in this, you may nevertheless succeed upon some of the general counts.

On an indictment for uttering a forged will, which, together with writings in support of it, it was suggested had been written over pencil-marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror, and traced

the pencil-marks, was admissible on the part of the prosecution. *R.* v. *T. Williams,* 8 *C. & P.* 434.

### *Indictment for forging a Bill of Exchange.*

*Commencement as ante, p.* 355]—a certain bill of exchange, ("*any bill of exchange, or any promissory note for the payment of money*") which said forged bill of exchange is as follows; that is to say, "50*l.* Bristol, 25th March, 1830. Three months after date pay to," [*&c. &c., setting out the bill of exchange in words and figures correctly*], with intent to defraud one J. N.; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*). *That the defendant* "did offer, utter, dispose of, and put off" *a certain other, &c. &c., as in the precedent,* (*ante, p.* 356). *If the acceptance be also forged, add counts for it in this form.* (*3rd Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the year and day last aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession a certain other bill of exchange, which said last-mentioned bill of exchange is as follows; that is to say, [*here set out the bill*], he the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did forge on the said last-mentioned bill of exchange an acceptance ("*any indorsement on, or assignment of, any bill of exchange or promissory note for the payment of money, or any acceptance of a bill of exchange*") of the said last-mentioned bill of exchange, which said forged acceptance is as follows; that is to say, "Accepted, payable at the bank of Messrs. Coutts & Co., John Giles," [*or as the acceptauce may be*], with intent to defraud the said J. N.; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*4th Count*). *Same as the last, to the end of the copy of the bill of exchange; and then as follows:* and on which said last-mentioned bill of exchange was then and there written a certain forged acceptance of the said last-mentioned bill of exchange, which said forged acceptance of the said last-mentioned bill of exchange is as follows, that is to say, [*here set out the acceptance, as in the last count*]; he the said J. S. well knowing the premises last aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off the said forged acceptance of the said last-mentioned bill of exchange, with intent to defraud the said J. N., (he the said J. S., at the time he so offered, uttered, disposed of, and put off the said forged acceptance of the said last-mentioned bill of exchange, then and there well knowing the said acceptance to be forged); against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If an indorsement be also forged, add counts for it in this form.* (*5th Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession a certain other bill of exchange, which said last-mentioned

bill of exchange is as follows, that is to say, [*here set out the bill,* he the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did forge on the back of the said last-mentioned bill of exchange, a certain indorsement of the said bill of exchange, which said forged indorsement is as follows; that is to say, "James Sykes & Co.," with intent to defraud the said J. N.; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*6th Count*). *Same as the last, to the end of the copy of the bill of exchange; and then as follows:* and on the back of which said last-mentioned bill of exchange was then and there written a certain forged indorsement of the said last-mentioned bill of exchange, which said last-mentioned forged indorsement is as follows: that is to say, "James Sykes & Co.;" he the said J. S. well knowing the premises last aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off the said last-mentioned forged indorsement of the said last-mentioned bill of exchange, with intent to defraud the said J. N., (he the said J. S., at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged indorsement of the said last-mentioned bill of exchange, then and there well knowing the said indorsement to be forged); against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts describing the bill, &c., in such manner as would support an indictment for stealing the same.* 2 *&* 3 *W.* 4, *c.* 123, *s.* 3, (*ante, p.* 350 ; *see ante, p.* 213). *Supposing J. N. to be the person to whom the bill was uttered or passed, add other sets of counts, charging the forging and uttering to have been with intent to defraud the drawer, acceptor, and indorser respectively. From the above precedent, an indictment may readily be framed for forging and uttering a promissory note, merely substituting for the words* "bill of exchange," *the words* "promissory note for the payment of money," *and omitting of course the counts as to the acceptance. An indictment under* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 30, (*ante, p.* 351), *for uttering a forged foreign bill or note, need not allege it to be payable out of England. Reg.* v. *Lee,* 2 *M. & Rob.* 281.

*Felony,* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 3, (*ante, p.* 368), *tranportation for life, or for not less than seven years, or imprisonment not exceeding four nor less than two years,* 7 *W.* 4 *&* 1 *Vict. c.* 84, *s.* 2, (*ante, p.* 354), *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 355).

## *Evidence.*

Produce the bill of exchange in evidence, and prove the forgery and uttering, as directed *ante, p.* 358, *&c.*

A bill payable ten days after sight, purporting to have been drawn upon the commissioners of the navy, by a lieutenant, for the amount of certain pay due to him, has been holden to be a bill of exchange within the repealed statute 2 *G.* 2, *c.* 25. *R.* v. *Chisholm, R. & R.* 297. So, a note, promising to pay A. and B., "stewardesses" of a certain benefit society, or their "successors," a certain sum of money

on demand, has been holden to be a promissory note within the meaning of that act, although it appeared that the society were not duly enrolled, as directed by act of Parliament: for, supposing the note to be a genuine instrument, if the successors would not be entitled to the money, the personal representatives of A. and B. would; and to be within the meaning of the act, it is not necessary that the note should be negotiable. *R.* v. *Box*, 6 *Taunt.* 325; *R. & R.* 300. *See R.* v. *M'Keay*, 1 *Mood. C. C.* 130. An instrument drawn by A. on B., requiring him to pay to the administrators of C. a certain sum at a certain time "without acceptance," is a bill of exchange; and may be so described in the indictment. *Reg.* v. *Kinnear*, 2 *M. & Rob.* 117. So, though there be no person named as drawee the defendant may be indicted for uttering a forged acceptance of a bill of exchange. *Reg.* v. *Hawkes*, 2 *Mood. C. C.* 60; for the act of putting the acceptance is a sort of estoppel to say it was not a bill of exchange. But an indictment for forging *a bill of exchange* cannot be sustained in the case of such an instrument. *Reg.* v. *Curry*, 2 *Mood. C. C.* 218. And a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to *his own* order, and purporting to be indorsed by the drawer, and accepted by the draver, cannot, in an indictment for forgery or uttering, be treated as a bill of exchange. *Reg.* v. *Bartlett*, 2 *M. & Rob.* 362. But an instrument payable to the order of A., and directed "*At* Messrs. P. & Co., Bankers," was held to be properly described as a bill of exchange. *Reg.* v. *Sidney Smith*, 2 *Mood. C. C.* 295; 1 *C. & K.* 700: *see Gray* v. *Milner*, 8 *Taunt.* 739. In order that a promissory note should be within the meaning of the act, it is necessary that it should be for the payment of money only; and therefore a country bank note for the payment of one guinea, "in cash or Bank of England notes," was holden not to be within the statute. *R.* v. *Wilcock*, 2 *Russ.* 498. *See* 1 *Leach*, 180; 2 *East, P. C.* 926.

Where the charge in the indictment was for forging "a certain indorsement *of*" a bill of exchange, "which said forged indorsement was and is as follows:—Magdalene Isherwood;" and the bill, as set out in some of the counts of the indictment, and as proved in evidence, was payable to the order of four persons, of whom Magdalene Isherwood was one, as joint executrixes; the indictment was held by all the judges to be sufficient, and the charge to be proved. *Reg.* v. *Winterbottom*, *Feb.* 1845.

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*Indictment for forging an Undertaking, Warrant, or Order for the Payment of Money.*

*Commencement as ante, p.* 355]—a certain warrant and order for the payment of money, ("*any undertaking, warrant, or order for the payment of money*"), which said forged warrant and order for the payment of money is as follows; that is to say, [*here set out the order*, (*see ante, p.* 356)], with intent to defraud J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *2nd Count*, (*as ante, p.* 356), *for offering, uttering, disposing of, and putting off*, "a certain other warrant and order for the payment of money," *Add counts describing the instruments or writing in such manner as*

*would support an indictment for stealing the same.* 2 *&* 3 *W.* 4, *c.* 123, (*ante*, *p.* 350; *see p.* 357).

*Felony.* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 3, *ante*, *p.* 368. *See the last precedent.*

*Evidence.*

Prove the forgery and uttering, &c., as directed *ante*, *p.* 358 *et seq.* It only remains here to shew what warrants, orders, &c., are within the meaning of the act.

A draft upon a banker (although it be post-dated, *Reg.* v. *Taylor*, 1 *C.* *&* *K.* 213) is a warrant and order for the payment of money, within the statute; *R.* v. *Willoughby*, 2 *East*, *P. C.* 944; so is even a bill of exchange. *R.* v. *Shepherd*, 1 *Leach*, 226. So, an order to pay "all my prize money due to me for my services on board his Majesty's ship, Leander," without specifying any particular sum, was holden to be within the repealed statute 7 *G.* 2, *c.* 22. *R.* v. *M'Intosh*, 2 *East*, *P. C.* 942. But where the defendant drew a bill, "Please to pay the bearer on demand fifteen pounds, and accompt it to your humble servant, C. H. Ravenscroft," which was his name; and when the instrument was uttered, there was forged upon it, "Payable at M. & Co.'s. Wm. M'Inchary;" and it appeared that Mr. M'Inchary kept cash at M. & Co.'s, who were bankers; it was holden that this was not an order for the payment of money, there being no special averment that it was intended for an order, or that M. & Co. were bankers. *R.* v. *Ravenscroft*, *R.* *&* *R.* 161. A writing in the form of a bill of exchange, but without any drawee's name, cannot be charged as an order for the payment of money; at least, unless shewn by averments to be such. *Reg.* v. *Curry*, 2 *Mood.* *C. C.* 218. On an indictment for forging and uttering a "warrant and order for the payment of money, to wit, a warrant and order for the payment of 85*l.*," and for forging an acquittance and receipt for money, to wit, for 85*l.*, it was proved that J. M. had paid 85*l.* into a country bank, and had taken an accountable receipt for that amount, and that the course of dealing at the bank was to treat such receipt with the depositor's name thereon, as an order for the payment of the money deposited, and interest. The defendant took the receipt to the bank, and having written the name of J. M. thereon, delivered it to the bankers, who paid him 87*l.* 17*s.* 6*d.* for principal and interest. He was held to have been rightly convicted. *Reg.* v. *Atkinson*, 2 *Mood. C. C.* 215; *C.* *&* *Mar.* 325. Where the instrument was an order to pay the prisoner, or order, the sum of four pounds five shillings, being a month's advance on an intended voyage to Quebec, in the ship Mary Ann, as per agreement with G. M., master; and the prisoner had written in the margin of the order, "on receiving this cheque I agreed to sail, and to be on board within sixteen days from the date of this cheque;" it was held a good order for the payment of money within the statute. *R.* v. *Bamfield*, 1 *Mood. C. C.* 417. So, a foreign letter requesting a correspondent in England to advance money, it being proved that such letters are in the course of business treated as orders, was held to support a charge of forging an order for the payment of money. *Reg.* v. *Raake*, 2 *Mood. C. C.* 66; 8 *C.* *&* *P.* 627. A writing purporting to authorize the bearer to receive money deposited in a bank by a friendly society on accountable receipts, and purporting to be signed by the principal officers of the society, (the bank having received

the money on terms of repayment to the order of the society) was held to be well described as a warrant for the payment of money, and it was held no objection that the defendant was himself a member of the society. *Reg.* v. *Harris*, 2 *Mood. C. C.* 267; 1 *C. & K.* 751. Where the forged paper was as follows: "This is to certify that R. R. has swept the flues and cleaned the bilges, and repaired four bridges of the Princess Victoria, J. N., 4*l.* 0*s.* 10*d.*;" and it was proved that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay the 4*l.* 0*s.* 10*d.*: this was holden sufficient to support an indictment, charging it as a warrant for the payment of money. *Reg.* v. *Rodgers*, 9 *C. & P.* 41. A letter, written to a wholesale house in London, in the name of a customer in the country, in the following terms:—"I shall feel obliged by your paying Mr. B. the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same: you will please have a receipt, and add the amount to invoice of order on hand," was held to be neither an undertaking, a warrant, nor an order for the payment of money; but a request. *Reg.* v. *Thorn*, 2 *Mood. C. C.* 210; *C. & Mar.* 206: *see also Reg.* v. *Roberts*, 2 *Mood. C. C.* 258; *C. & Mar.* 652.

The order must purport to be signed by some person who might command the payment of the money, and to be directed to a person who was compellable to obey it. *See R.* v. *Clinch*, 2 *East, P. C.* 938. Thus, an order to a tradesman to let the bearer have certain goods, and which it was optional with the tradesman to obey or not, was holden not to be within the repealed stat. 45 *G.* 3, *c.* 89, the words of which were "warrant or order for the delivery of goods." *R.* v. *Williams*, 1 *Leach*, 114: *R.* v. *Mitchell*, *Fost.* 119: *and see R.* v. *Ellar*, 1 *Leach*, 323: *R.* v. *Baker*, 1 *Mood. C. C.* 231: *Reg.* v. *Newton*, 2 *Mood. C. C.* 59: *Reg.* v. *Thorn*, *supra.* So, a forged magistrate's order for a reward for apprehending a vagrant, which appeared upon the face of it to be defective, as not being under seal, or directed to the constable, &c. was holden not to be within the statute; for, without these requisites, it was nothing more than the order of a mere individual, which the treasurer was not bound to obey. *R.* v. *Rushworth*, *R. & R.* 317. So, an indictment for forging an order for relief to a discharged prisoner, under the 5 *G.* 4, *c.* 85, being in many instances ungrammatical and at variance from the act, was held bad. *R.* v. *Donnelly*, 1 *Mood. C. C.* 438. Such an instrument, however, is properly described as an order for the payment of money. *Reg.* v. *M'Connell*, 2 *Mood. C. C.* 298; 1 *C. & K.* 371. Where a defendant was indicted for forging the order of a justice upon the treasurer of a county under the stat. 48 *G.* 3, *c.* 75, by which a justice may order the treasurer of a county to pay churchwardens, &c., the expenses of burying dead bodies cast on shore, and it did not appear on the order that the person to whom the money was to be paid was an officer within the words of that statute; it was holden to be an order within the statute; because it did not appear that the party was *not* such an officer, and the treasurer was bound to conclude that the justice would not make such an order without satisfying himself that, the party was such an officer. *R.* v. *Froud*, *R. & R.* 389. In *R.* v. *Baker* 1 *Mood. C. C.* 231, the forged instrument was thus:—"Mr. Thomas. Sir, you will please pay the bearer, for Richard Power, three pounds, for three weeks, due to him, a country member, and you will oblige yours, &c., J. Beswick." Beswick was secretary to a friendly society, some of whose funds were in the hands of Thomas. The pri-

soner was convicted; but the judges held this not to be an order upon the face of it, and that the conviction was wrong. A forged draft on a banker, in a fictitious name, or in the name of a person who never kept cash with the banker, is a warrant or order within the meaning of the act; *R.* v. *Lockett*, 1 *Leach*, 94: *R.* v. *Abraham*, 2 *East, P. C.* 941; for it imports, upon the face of it, to be an order by a person having authority to make it. So, a forged draft in the name of a person who *does* keep cash with the banker, is an order within the act, whatever be the state of his account at the time. *Reg.* v. *Carter*, 1 *C. & K.* 741. Where, on the contrary, a man obtains goods upon his own draft on a banker, with whom he does not keep cash, we have seen (*ante, p.* 292) that the proper mode of proceeding against him criminally is by indictment for the fraud.

The cases on this subject, some of which it is not very easy to reconcile, were all considered by the judges in *Reg.* v. *Vivian*, 1 *C. & K.* 719, in which they laid down the principle, that any instrument for payment of money, under which, if genuine, the payer might recover the amount against the party signing it, might properly be considered as a *warrant* for the payment of money; and that it was equally such, whatever were the state of account between the parties, and whether the party signing it had at the time funds in the hands of the party to whom it was addressed or not. In that case, the forged instrument was as follows:—"Mr. M. will be pleased to send by the bearer £10 on Mr. H.'s account, as Mr. H. is very bad in bed, and cannot come himself." Signed, "M. R., foreman, St. A. foundry." M. was a clerk of bankers, with whom H. kept an account, and by drafts on whom he paid his workmen. M. R. was H.'s foreman, having authority to pay the workmen, but not to draw for the money. H. being ill in bed, the defendant forged this paper in the name of M. R., and obtained the £10 from M. by means of it. It was held that he was properly convicted under the 1 *W.* 4, *c.* 66, *s.* 3, although M. R. had himself no account with the bankers; because by this instrument, if genuine, M. R. said in effect that he had authority from H., who had an account with them; and as against him, therefore, it was as much a warrant as if he himself had had such account, and would equally have bound him. This decision seems to render the authority of some of those before referred to at least questionable.

Lastly, it has been laid down that the order must purport to be directed to the person having possession of the money; and, therefore, where an order, to deliver to the bearer 8 *lbs.* of silk, did not appear to be directed to any person, it was holden by the judges not to be within the repealed stat. 45 *G.* 3, *c.* 89, *s.* 1, the words of which were "warrant or order," &c. *R.* v. *Clinch*, 2 *East, P. C.* 938. In the recent case of *Reg.* v. *Rogers*, 9 *C. & P.* 41, however, it was held by *Bosanquet*, J., and *Parke*, B., that a warrant for the payment of money need not, in order to come within the statute, be addressed to any particular person; but that it is sufficient if it would, if genuine, have been an authority to a certain person to pay the amount mentioned in it.

It is no offence, under this section of the statute, to forge an *indorsement* on a warrant or order for the payment of money. *R.* v. *Arscott*, 6 *C. & P.* 408.

A written promise to pay a sum specified, or such other sum, not

exceeding the same, as A. B. may incur by reason of his suretyship, is an *undertaking* for the payment of money, within the statute. *Reg.* v. *Reed*, 2 *Mood. C. C.* 62; 8 *C. & P.* 623. A sailor's *shipping note* for a certain sum, payable to A. or bearer, five days after the ship shall sail, is an undertaking within the statute. *Reg.* v. *Anderson*, 2 *M. & Rob.* 469.

## MAKING FALSE ENTRIES OF STOCK, &C.

### *Statutes.*

11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 5]—Enacts, that if any person shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the Bank of England, or by the governor and company of merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery, commonly called the South Sea Company, in which books the accounts of the owners of any stock, annuities, or other public funds, which now are or hereafter may be transferable at the Bank of England or at the South Sea House, shall be entered and kept, or shall in any manner wilfully falsify the accounts of such owners in any of the said books, with intent, in any of the cases aforesaid, to defraud any person whatsoever; or if any person shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the South Sea House, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. *See now* 7 *W.* 4 & 1 *Vict. c.* 84, *s.* 1; (*ante, p.* 354).

### *Indictment for making false Entries of Stock.*

*Commencement as ante, p.* 355]—in the county aforesaid, feloniously did wilfully alter certain words and figures ("*any words or figures*"); that is to say, [*here set out the words and figures as they were before the alteration*], in a certain book of account kept by the governor and company of the Bank of England, in which said book the accounts of the owners of certain stock, annuities, and other public funds, to wit, the [*state the stock*], which were then transferable at the Bank of England, were then and there kept and entered, by [*set out the alteration, and the state of the account or item when so altered*], with intent then and there and thereby to defraud the governor and company of the Bank of England; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count charging the intent to defraud the owner of the stock.*

***Felony***, 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 5, ***transportation for life, or for not less than seven years, or imprisonment not exceeding four nor less than two years***, 7 *W.* 4 & 1 *Vict. c.* 84, *s.* 1, (*ante, p.* 354), ***with or***

*without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 355).

*Evidence.*

Prove the alteration as stated in the indictment, and the intent as *ante, p.* 363.

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*Indictment for making a Transfer of Stock in the Name of a Person not the Owner.*

*Commencement as ante, p.* 355]—in the county aforesaid, feloniously did wilfully make a transfer of a certain share and interest of and in certain stock and annuities, ("*stock annuity, or other public fund*"), which were then transferable at the Bank of England, to wit, the share and interest of —— in the ——, [*state the amount and nature of the stock*], in the name of one C. D., he the said C. D., not being then and there the true and lawful owner of the said share and interest of and in the stock and annuities, or any part thereof, with intent then and there and thereby to defraud the governor and company of the Bank of England ; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count with an intent to defraud the owner of the stock, and also the person to whom it was transferred.*

*Felony.* 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 5. *See the last precedent.*

*Evidence.*

Prove the transfer, as stated in the indictment, of transferable stock ; prove that the person in whose name it was made was not the true owner, and prove the intent as *ante, p.* 104.

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FORGING TRANSFERS OF STOCK, POWERS OF ATTORNEY, &c.

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*Statute.*

11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 6]—Enacts, that if any person shall forge or alter, or shall utter, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the South Sea House, or of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter or act of Parliament, or shall forge or alter, or shall utter, knowing the same to be forged or altered, any power or attorney, or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with in-

tent, in any of the several cases aforesaid, to defraud any person whatsoever; or if any person shall falsely and deceitfully personate any owner of any such share, interest, or dividend as aforesaid, and thereby transfer any share or interest belonging to such owner, or thereby receive any money due to such owner as if such person were the true and lawful owner, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. *See* 7 *W.* 4 *&* 1 *Vict. c.* 34, *s.* 1, (*ante, p.* 354).

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### *Indictment for forging and uttering a Transfer of Stock.*

*Commencement as ante, p.* 355]—in the county aforesaid feloniously did forge a transfer of a certain share and interest in certain stock and annuities ("*stock, annuity, or other public fund*"), to wit, ——, [*state the amount and description of stock*], which said stock and annuities were then transferable at the Bank of England, and which said transfer then and there purported to be made by one J. N., with intent then and there and thereby to defraud the governor and company of the Bank of England; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*).—did utter a certain other forged transfer of a certain share and interest of and in certain other stock and annuities, to wit, ——, which said last-mentioned stock and annuities were then transferable at the Bank of England, and which said last-mentioned transfer then and there purported to be made by one J. N., with intent then and there to defraud the governor and company of the Bank of England, he the said J. S., at the time he so uttered the said last-mentioned forged transfer of the said share and annuity, then and there well-knowing the same to be forged; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts with intent to defraud the owner of the stock, and the person to whom the stock was transferred.*

*Felony,* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 6, *transportation for life or for not less than seven years, or imprisonment not exceeding four nor less than two years,* 7 *W.* 4 *&* 1 *Vict. c.* 84, *s.* 2, (*ante, p.* 354), *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 3, (*ante, p.* 355).

### *Evidence.*

Produce the transfer, and prove it to be forged; prove that the prisoner forged it, and the intent *as ante p.* 363.

To support the second count, prove the uttering of the forged transfer, the intent, and the criminal knowledge, *as ante, p.* 366.

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### *Indictment for forging and uttering a Power of Attorney to sell out Stock, &c.*

*Commencement as ante, p.* 355]—in the county aforesaid, feloniously

did forge a certain power of attorney to transfer a certain share and interest in certain stock and annuities which then were transferable at the Bank of England, (*"stock, annuity, or other public fund, transferable at the Bank of England, or at the South Sea House,"* or *"capital stock of any body corporate, company, or society, established by charter or act of Parliament"*), which said forged power of attorney is as follows; that is to say [*here set it out*], with intent then and there to defraud the governor and company of the Bank of England; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*)—in the county aforesaid, feloniously did utter a certain other forged power of attorney, purporting to be a power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which then were transferable at the Bank of England, to wit, ——, with intent then and there to defraud the governor and company of the Bank of England, he the said J. S. then and there well knowing the said last-mentioned power of attorney to be forged; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*3rd Count*). —in the county aforesaid, feloniously did demand and endeavour to have a certain share and interest of the said J. N. in certain stock and annuities which were then transferable at the Bank of England, to wit, ——, transferred, (*"to have any stock, share, or interest, transferred or to receive any dividend payable in respect thereof"*), in the books of the said Bank of England, by virtue of a certain other forged power of attorney, purporting to be a power of attorney to transfer the said share and interest of the said J. N. in the said stock and annuities so transferable as aforesaid, with intent then and there to defraud the governor and company of the Bank of England, he the said J. S., at the time he so demanded and endeavoured to have the said share and interest transferred as aforesaid, then and there well-knowing the said last-mentioned power of attorney to be forged; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts with intent to defraud the owner of the stock, and also the person to whom the prisoner attempted to transfer it.*

*Such a power of attorney before this statute, was holden to be a deed within the stat.* 2 *G.* 2, *c.* 25, *s.* 1. *R.* v. *Fauntleroy,* 1 *Mood. C. C.* 52; 2 *Bing.* 413.

*Felony.* 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 6. *See the last precedent.*

*Evidence.*

*1st Count*—Produce the power of attorney; prove it to be forged by the prisoner; shew the stock to be transferable, and give evidence of the intent, as *ante, p.* 363.

*2nd Count*—Prove the power of attorney to have been forged, the transferable nature of the stock, the uttering as *ante, p.* 365, the guilty knowledge, and the intent as stated in the indictment.

*3rd Count*—Prove the power of attorney to have been forged, the transferable nature of the stock, the guilty knowledge, the attempt or endeavour by the prisoner as stated in the indictment, and the intent.

## FORGING AN ATTESTATION TO A POWER OF ATTORNEY.

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### *Statute.*

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 8]—Enacts, that if any person shall forge the name or handwriting of any person, as or purporting to be a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or shall utter any such power of attorney or other authority, with the name or handwriting of any person forged thereon as an attesting witness, knowing the same to be forged, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year.

### *Indictment.*

*Commencement as ante, p.* 355]—in the county aforesaid, feloniously did forge the name and handwriting of one ——, as and purporting to be a witness attesting the execution of a certain power of attorney to transfer a certain share and interest of one J. N. in certain stock and annuities, which were then transferable at the Bank of England, to wit, ——, [*here state the amount and nature of the stock*]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count, for uttering*)—did utter a certain other forged power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which were then transferable at the Bank of England, to wit, ——, with the name of the said —— forged on the said last-mentioned power of attorney as an attesting witness to the execution thereof, he the said J. S. at the time he so uttered the same, then and there well knowing the said name and handwriting, purporting to be the name and handwriting of the said —— thereon as attesting witness thereof as aforesaid, to be forged; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for seven years, or imprisonment for not more than two years, nor less than one year,* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 8, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5; (*ante, p.* 169).

### *Evidence.*

To support the first count, produce the power of attorney, and prove it to be forged, and prove the transferable nature of the stock mentioned in the indictment.

To support the second count, produce the power of attorney, and prove it to have been forged; prove the uttering as *ante, p.* 365, and the guilty knowledge as *ante, p.* 366.

CLERKS OF THE BANK, &c., MAKING OUT WARRANTS FOR MORE THAN IS DUE.

*Statute.*

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 9]—Enacts, that if any clerk, officer, or servant of, or other person employed or intrusted by, the governor and company of the Bank of England, or the governor and company of merchants commonly called the South Sea Company, shall knowingly make out or deliver any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out is or are entitled to, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year.

*Indictment.*

*Commencement as ante, p.* 355]—in the county aforesaid, then and there being a clerk ("*clerk, officer, or servant*") of the governor and company of the Bank of England, and employed and intrusted by them, then and there feloniously did knowingly make out and deliver to one J. N. a certain dividend warrant for a greater ["*greater or less*"] amount than the said J. N. was then and there entitled to, to wit, for the sum of five hundred pounds; whereas in truth and fact the said J. N. was then and there entitled to the sum of one hundred pounds only, with intent then and there and thereby to defraud the governor and company of the Bank of England; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony.* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 9. *See the last precedent.*

*Evidence.*

Prove that J. S. was a clerk or servant of the Bank of England; (*see ante, p.* 277); produce the warrant, and prove it to be the prisoner's hand-writing; shew the amount of stock to which J. N. was entitled, and prove the intent as directed *ante, p.* 363.

FORGING A DEED, BOND, RECEIPT, &c.

*Statute.*

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 10]—Enacts, that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing, obligatory, or any court-roll, or copy of any court-roll, relating to any copyhold

or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

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### *Indictment for forging a Bond.*

*Commencement as ante, p.* 355]—a certain bond and writing obligatory, (*"any deed, bond, or writing obligatory"*); which said forged bond and writing obligatory is as follows: that is to say, "Know all men," [*&c. &c. so proceeding to set out the bond and condition verbatim, see ante, p.* 362], with intent to defraud the said J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged bond and writing obligatory, which said last-mentioned forged bond and writing obligatory is as follows: that is to say, "Know all men," [*&c. &c., setting out the bond and condition verbatim*], with intent to defraud the said J. N., he the said J. S. at the time he so altered, uttered, disposed of, and put off the said last-mentioned forged bond and writing obligatory as aforesaid, then and there well knowing the same to be forged; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts describing the instrument in such manner as would support an indictment for stealing the same.* 2 & 3 *W.* 4, *c.* 123, *s.* 3, (*ante, p.* 350; *see p.* 356).

*Felony, transportation for life or for not less than seven years, or imprisonment for not more than four nor less than two years,* 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 10, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

### *Evidence.*

Prove the forging and uttering, as directed *ante, p.* 358 *et seq.* Under the second count, you may give in evidence a disposing of the bond as a forgery, or the making use of it, or attempting to make use of it, as a genuine instrument.

The forging of a deed, which is directed to be in a particular form by particular statutes, which had not been complied with, has been decided to be within the repealed stat. 2 *G.* 2, *c.* 25. *R.* v. *Lyon, R.* & *R.* 255. And a power of attorney to transfer government stock, signed, sealed, and delivered, was holden to be a deed within that statute. *R.* v. *Fauntleroy,* 1 *Mood. C. C.* 52; 2 *Bing.* 413. But the

forging of a power of attorney is now the subject of a distinct provision. 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 6, (*ante, p.* 379). The giving an administration bond to the ordinary in a false name, is a forgery. *Reg.* v. *Barber*, 1 *C.* & *K.* 434.

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### *Indictment for forging a Receipt.*

*Commencement as ante, p.* 355]—a certain acquittance and receipt for money, ("*any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for the payment of money*"), which said forged acquittance and receipt for money is as follows: that is to say, [*here set out the receipt in words and figures correctly, (see ante, p.* 357)], with intent to defraud J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, or put off, a certain other forged acquittance and receipt for money, which said last-mentioned forged acquittance and receipt for money is as follows, that is to say, [*here set out the receipt*], with intent to defraud the said J. N., (he the said J. S., at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged acquittance and receipt for money as aforesaid, then and there well knowing the same to be forged); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts describing the instrument in such manner as would support an indictment for stealing the same.* 2 & 3 *W.* 4, *c.* 123, *s.* 3, (*ante, p.* 350). *See R.* v. *Vaughan*, 8 *C.* & *P.* 276: *Reg.* v. *Boardman*, 2 *M.* & *Rob.* 147, (*ante, p.* 355).

*Felony. See the last precedent.* 11 *G.* 4 & 1 *W.* 4, *c.* 66. *s.* 10.

### *Evidence.*

Prove the forgery and uttering, &c., as directed *ante, pp.* 358, 365. A receipt for *bank-notes* was holden not to be an acquittance or receipt for money or goods within the meaning of the stat. 2 *G.* 2, *c.* 25, because that statute did not contain the words, "note, bill, or other security," which are in the present statute. *R.* v. *Harrison*, 1 *Leach*, 180; 2 *East, P. C.* 926. So, a scrip receipt, in which a blank was left for the subscriber's name, was holden not to be a receipt within the statute; *R.* v. *Lyon*, 2 *Leach*, 397; *and see Id.* 808, &c.; but it would have been otherwise, if the blank had been filled up. So, a memorandum, importing that A. B. had paid to C. D. a sum of money, but importing no acknowledgment from C. D. of his having received it, was holden not to be a receipt within that statute, which however did not contain the words "accountable receipt." *R.* v. *Harvey*, *R.* & *R.* 227. The prisoner was indicted for forging and uttering a receipt on an order for the payment of money, which appeared to be thus:—"Received, for R. Aikman," written on the back of a bill of exchange payable at a banker's; *Littledale*, J., *Vaughan*,

J., and *Bolland*, B., held that the evidence did not support the indictment, and directed an acquittal. *R.* v. *Arscott*, 6 *C.* & *P.* 408. Where it was shewn to be the custom of bankers to give receipts on the deposit of money in the following form:—" Received of A. B. £85 to his credit. This receipt not transferable;" and to repay the same, with interest, on the return of the receipt, with a name written on it; it was held that the forging the name of A. B., and receiving the money due, on its return, was a forging and uttering an acquittance for the £85 and interest. *Reg.* v. *Atkinson*, 2 *Mood. C. C.* 215; *C.* & *Mar.* 325. A receipt, signed by the captain of a detachment, on the authority of which money is received from an army agent, on account of the monthly subsistence of such detachment, was held to be properly described as a receipt for money, although it appeared that such instruments were frequently cashed upon indorsement by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by them of the army agent. *R.* v. *Rice*, 6 *C.* & *P.* 634: *R.* v. *Hope*, 1 *Mood. C. C.* 414. Where a high constable had issued his precept for the payment of a county rate for a certain amount, and, having received it, wrote a receipt at the foot, and the prisoner who had collected the rate, afterwards fraudulently altered the precept, by adding a figure in the amount, (viz. changing *5s.* to *15s.*), and claimed to be allowed that larger amount in account, this was held to be a forgery of the receipt. *R.* v. *Vaughan*, 8 *C.* & *P.* 276.

As to the cases in which averments are necessary in the indictment, to shew that the forged instrument imported a receipt or acquittance, *see ante, p.* 357. Where the instrument is not set out, but is only described, pursuant to the stat. 2 & 3 *W.* 4, *c.* 123, *s.* 3, in such manner as would support an indictment for stealing it, no such averments are applicable or necessary: it then becomes matter of *evidence* whether the instrument, when produced, appears to be within the statute. (*See ante, p.* 357). *Reg.* v. *Rogers*, 9 *C.* & *P.* 41.

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### *Indictment for forging a Warrant, Order, or Request for the Delivery of goods, &c.*

*The same as the last precedent but two, only substituting the words* " warrant, and order for the delivery of goods," (" *any warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security, for the payment of money*"), *for the words* " warrant and order for the payment of money."

*Felony. See the last precedent but one.* 1 *W.* 4, *c.* 66, *s.* 10.

### *Evidence.*

Prove the forgery and uttering, &c., as directed *ante, p.* 358 *et seq.* An order " to deliver my work to bearer," (and which was explained in evidence to mean an order to Goldsmiths' Hall to deliver certain plate a silversmith had sent there to be marked), was holden to be within the stat. 7 *G.* 2, *c.* 22, although it did not specify any particular articles. *R.* v. *Jones*, 1 *Leach*, 53. A request for the delivery of goods need not be addressed to any one. *R.* v. *Carney*, 1 *Mood. C. C.* 351. The words of the repealed stat. 42 *G.* 3, *c.* 89, *s.* 1, were " war-

rant or order," and it was held to be necessary, to come within those words, that the order should purport to be signed by some person who might compel the delivery, and be directed to some person compellable to obey it. The present statute contains the word "request;" and a request need not be directed to any one; *R.* v. *Cullen*, 1 *Mood. C. C.* 300: *Reg.* v. *James*, 8 *C. & P.* 292: *Reg.* v. *Pulbrook*, 9 *C. & P.* 37; nor be signed by a person who can compel a performance of it, or who has any authority over or interest in the goods. *Reg.* v. *Thomas*, 2 *Mood. C. C.* 16. *See Reg.* v. *Thorn*, 2 *Mood. C. C.* 210; *C. & Mar.* 206; (*ante, p.* 376). It must be shewn in the indictment to be a request, and if the words have not necessarily that effect, and the instrument is set out, it must be explained by averments; or, if not set out, by evidence. *R.* v. *Cullen*, 1 *Mood. C. C.* 300; 5 *C. & P.* 116. *Reg.* v. *Walters*, *C. & Mar.* 588. (*See ante, p.* 357). Where a forged writing was, "Mr. Brooks, let the bearer, W. Turton, have, for J. Roe, four yards of Irish linen and a waistcoat: John Roe:" and the prisoner, was indicted for obtaining the goods under false pretences—*Taunton*, J. held that the uttering of such a note was a felony under this statute and directed an acquittal. *R.* v. *Evans*, 5 *C. & P.* 553. Where the prisoner represented that M. C. was dead, and had left him 50*l.* or 60*l.*, which was in the hands of A. D., and that he wanted mourning, and brought a forged paper purporting to be signed by A. D., containing the following: "Please to let W. T. have such things as he wants for the purpose; I have got the amount of 27*l.* for M. C. in my keeping these many years"—this was held to be a forged request within the statute. *R.* v. *Thomas*, 7 *C. & P.* 851. So, a paper in the following form was held to be a request for the delivery of goods, though not addressed to any one:—"Augt. 3. '39. One 16-in. helmet scoop; one 4 qt. kettle. Jas. Hayward." *Reg.* v. *Pulbrook*, 9 *C. & P.* 37. So also a paper as follows: "Please let the lad have a hat, and I will answer for the money. E. B." *Reg.* v. *White*, *Id.* 282. And it is not the less a forged request for the delivery of goods, because it may also be a forged undertaking for the payment of money. *Ib.* Nor will it make any difference, that the defendant alone was looked to for payment. *Reg.* v. *Thomas*, 2 *Mood. C. C.* 16. Where the forged request was addressed to a woman in her maiden name, but she had married before the date of it, an indictment charging the intent to be to defraud her husband was held good. *R.* v. *Carter*, 7 *C. & P.* 134.

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## PURCHASING OR RECEIVING FORGED BANK NOTES.

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### *Statute.*

11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 12]—Enacts, that if any person shall, without lawful excuse, the proof whereof shall lie upon the party accused, purchase or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill knowing the same respectively to be forged, every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

*Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, feloniously, and without lawful excuse, had in his custody and possession ("*purchase or receive from any person, or have in his custody or possession*") five forged bank notes ("*any forged bank note, bank bill of Exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill*" for the payment of ten pounds each, the said J. S. then and there well knowing the said several bank notes, and each and every of them respectively, to be forged; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, fourteen years' transportation.* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 12.

*Evidence.*

Prove that the defendant had in his possession the bank notes set out in the indictment, or one of them; and prove the notes to be forgeries, as directed *ante, p.* 358 *et seq.* The act says "in his possession or custody," which, by a subsequent section (28, *ante, p.* 350), is interpreted to mean in his personal custody or possession, or knowingly and wilfully in any dwelling-house, or other building lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by him or not, and whether it be had for his own use, or for the use or benefit of another. *See R.* v. *Rowley, R. & R.* 110. These several species of custody or possession are by the statute to be deemed and taken to be his custody and possession within the meaning of the act; and therefore it is unnecessary to describe the custody and possession otherwise than as in the above precedent. As to the defendant's knowledge that the notes found upon him were bad, it can be proved by circumstantial evidence only. (*See ante, p.* 366). After proof that the defendant had in his possession forged notes, the proof of lawful excuse lies upon the defendant. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 12.

In bank prosecutions, where two indictments are preferred and found, one for the capital offence, and the other for the transportable offence, at one and the same time, for one and the same fact, the bank may proceed for the minor offence, and the defendant will not be entitled to be acquitted for the minor offence, by reason that, on the trial for that offence, facts appear sufficient to support the capital charge. *R. & R.* 378.

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MAKING FALSE ENTRIES IN REGISTERS OF BAPTISMS, &C.

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*Statute.*

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 20—*Forging Registers of Marriage, Baptism, &c.*]—Enacts, that if any person shall knowingly and wilfully insert, or cause or permit to be inserted in any register of

baptisms, marriages, or burials, which hath been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry, in England, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, in any such register, any entry of any matter, relating to any baptism, marriage, or burial; or shall utter any writing as and for a copy of an entry in any such register, of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered; or if any person shall utter any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered; or shall wilfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any such register, or any part thereof; or shall forge or alter, or shall utter, knowing the same to be forged or altered, any license of marriage; every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

Sect. 21—*Not to affect Alterations by Ministers*]—Provides and enacts, that no rector, vicar, curate, or officiating minister of any parish, district-parish, or chapelry, who shall discover any error in the form or substance of the entry in the register of any baptism, marriage, or burial, respectively by him solemnized, shall be liable to any of the penalties herein mentioned, if he shall, within one calendar month after the discovery of such error, in the presence of the parent or parents of the child baptized, or of the parties married, or in the presence of two persons who shall have attended at any burial, or, in the case of the death or absence of the respective parties aforesaid, then in the presence of the churchwardens or chapelwardens, correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the register wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made; and such correction and signature shall be attested by the parties in whose presence the same are directed to be made as aforesaid; provided also, that in the copy of the register which shall be transmitted to the registrar of the diocese, the said rector, vicar, curate, or officiating minister shall certify the corrections so made by him as aforesaid. (*See also* 6 *&* 7 *W.* 4, *c.* 86, *s.* 44).

Sect. 22—*Registers transmitted to Ordinary*]—And whereas copies of the registers of baptisms, marriages, and burials, such copies being signed and verified by the written declarations of the rector, vicar, curate, or officiating minister of every parish, district-parish, and chapelry, in England, where the ceremonies of baptism, marriage, and burial may lawfully be performed, are directed by law to be made and transmitted to the registrar of the diocese within which such parish, district-parish, or chapelry may be situated; be it therefore enacted, that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register so directed to be transmitted as aforesaid, any false entry of any matter relating

to any baptism, marriage, or burial, or shall forge or alter, or shall utter, knowing the same to be forged or altered, any copy of any register so directed to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year.

6 & 7 *W.* 4, *c.* 85, *s.* 43—*Falsifying Register-books of Births, Marriages, and Deaths*]—Enacts, that every person who shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of such register-book or certified copy thereof, (*see ss.* 30—34), or shall wilfully insert or cause to be inserted in any register-book or certified copy thereof any false entry of any birth, death, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any register-book, knowing the same register to be false in any part thereof, or shall forge or counterfeit the seal of the register office, shall be guilty of felony.

3 & 4 *Vict. c.* 91, *s.* 8]—Enacts, that every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register or record of birth or baptism, naming or dedication, death or burial, or marriage, which shall be deposited with the registrar-general by virtue of this act, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or record, or shall wilfully insert or cause to be inserted in any of such registers or records, any false entry of any birth or baptism, naming or dedication, death or burial, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be an extract from any register or record, knowing the same register or record to be false in any part thereof, or shall forge or counterfeit the seal of the said office, shall be guilty of felony.

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### *Indictment for making a False Entry in a Marriage Register.*

*Commencement as ante, p.* 355]—in the county aforesaid, feloniously and wilfully did insert, and cause and permit to be inserted, in a certain register of marriage, ("*baptisms, marriages, or burials*"), which was then kept by the rector of the said parish, ("*rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry*"), a certain false entry relating to a supposed marriage, and which said false entry is as follows; that is to say [*set it out verbatim, with innuendoes, if necessary, to explain it*], whereas in truth and in fact the said A. B. was not married to the said C. D., at the said church on the said —— day of ——, as in the said entry is falsely alleged and stated; and whereas in truth and in fact the said C. D. was not married to the said A. B., at the said church or elsewhere, at the time in the said entry mentioned, or at any other time whatsoever; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

(*2nd Count, for uttering*)—did knowingly and wilfully utter a certain other false entry relating to a certain supposed marriage, which said last-mentioned entry was before then inserted in a certain register of marriages kept by the rector of the said parish, and which said last-mentioned entry is as follows; that is to say, [*set it out*], whereas in truth and in fact, [*as above*]. And the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., at the time he so uttered the said last-mentioned false entry, then and there well knew the same to be forged; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts describing the instrument in such manner as would support an indictment for stealing the same, supposing it were the subject of larceny. See Reg.* v. *Sharpe*, 8 *C. & P.* 436.

*A count charging that the defendant "feloniously and wilfully did destroy, deface, and injure a parish register," is not bad for duplicity, and it is not necessary to allege a scienter as to such a charge. Reg.* v. *Bowen*, 1 *C. & P.* 501.

*Felony, transportation for life or for not less than seven years, or imprisonment not exceeding four or less than two years*, 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 20, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*No specific punishment is enacted by the stats.* 6 & 7 *W. c.* 86, *s.* 43, *and* 3 & 4 *Vict. c.* 92, *s.* 8, *for the offences therein mentioned.*

### *Evidence.*

Produce the register, prove it to be kept as stated in the indictment, and prove the forgery or uttering as *ante, p.* 358 *et seq.*, according as the fact is alleged in the indictment. The court will take judicial notice that a parish in the county of Stafford, or any other English county, is in England, and the indictment need not aver that fact. *Reg.* v. *Sharpe*, 8 *C. & P.* 436.

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### *Indictment at Common Law for forging a Fieri Facias.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, unlawfully and wickedly contriving to injure, oppress, impoverish, and defraud one J. N., then and there unlawfully, knowingly, and falsely did forge and counterfeit a certain writing on parchment, purporting to be a writ of our lady the Queen of *fieri facias*, and to have issued out of the court of our said lady the Queen of the Bench at Westminster, in the county aforesaid; which said false, forged, and counterfeited writing is as follows; that is to say, [*here set out the fieri facias verbatim*], with intent the said J. N. to injure, oppress, impoverish, and defraud; to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *This count appears to be sufficient, without stating that the writ was actually executed, or the prosecutor's*

*goods seized under it. However, it may be as well to add a second count similar to the above, to the end of the statement of the fi. fa., and then continue thus:* with intent the said J. N. to injure, oppress, impoverish, and defraud. And the said J. S. afterwards, and before the said last-mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, the said last-mentioned false, forged, and counterfeited writing, knowingly, falsely, and deceitfully, as a true writ of our said lady the Queen of *fieri facias*, did cause to be delivered to the then sheriff of Middlesex, for execution to be made thereof; and afterwards, and before the last-mentioned pretended writ purported to be returnable, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did cause to be seized and taken divers goods and chattels of the said J. N., to a large amount, by pretence of the said pretended writ; to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. (*3rd Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, falsely, and deceitfully did utter and publish as a true writ of our lady the Queen of *fieri facias*, a certain other false, forged, and counterfeited writing on parchment, purporting to be a writ of our lady the Queen of *fieri facias*, and to have issued out of the court of our lady the Queen, of the Bench at Westminster, in the county aforesaid; which said false, forged, and counterfeited writing is as follows, that is to say, [*here set out the writ verbatim*], with intent the said J. N. to injure, oppress, impoverish, and defraud, (he the said J. S., at the said time he so uttered and published the said last-mentioned false, forged, and counterfeited writing, as aforesaid, then and there well knowing the same to be false, forged, and counterfeited). And the said J. S. afterwards, and before the said last-mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, the last-mentioned false, forged, and counterfeited writing, knowingly, falsely, and deceitfully, as a true writ of our lady the Queen of *fieri facias*, did cause to be delivered to the then sheriff of Middlesex, for execution to be made thereof; and afterwards, and before the said last-mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did cause to be seized and taken divers goods and chattels of the said J. N. to a large amount, by pretence of the said pretended writ; to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *Add counts describing the instrument, &c., in such manner as would sustain an indictment for stealing the same.* 2 *&* 3 *W.* 4, *c.* 123, *s.* 3, (*ante, p.* 350); *and see p.* 335.

*Misdemeanor at common law. The forging and counterfeiting of any writing, or uttering and publishing it as true, knowing it to be forged and counterfeited, with a fraudulent intent, whereby another may be prejudiced, is a misdemeanor at common law, in all cases where it has not been made felony by statute. See* 2 *East, P. C.* 861. *R.* v. *Wilcox, R. & R.* 50. *Thus, counterfeiting a letter of credit,* 1 *Str.* 12; *a bill of lading,* 1 *Salk.* 342; *a debtor's discharge, R.* v. *Fawcett,* 2 *East, P.*

*C.* 862; *a county court summons, R.* v. *Collier*, 5 *C. & P.* 160; *a magistrate's order to a gaoler to discharge a prisoner, as upon bail having been given, R.* v. *Harris*, 1 *Mood. C. C.* 393; *and the like, see* 2 *East, P. C.* 862—*are forgeries at common law.*

*Evidence.*

Prove the forgery and uttering, as directed *ante, p.* 358 *et seq.*, except that it must be proved that the defendant uttered the instrument as true; to prove that he sold or disposed of it will not support the indictment. Prove also the delivery of the writ to the sheriff, and the levy under it, as stated in the indictment. If the forgery be proved, it should seem to be sufficient, although the prosecutor fail in proof of the delivery of the writ to the sheriff, and of the levy under it; for, notwithstanding some ancient authorities to the contrary, it does not appear to be necessary that the fraud contemplated should have been actually effected by the forgery, to render it indictable at common law; the mere intent to defraud seems to be sufficient. *See* 2 *East, P. C.* 861, 862.

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*Indictments for Forgery in other Cases.*

With the assistance of the precedents already given, which are those most generally required in practice, indictments may readily be framed upon any of the other statutes on the subject of forgery, attention being paid to the operative words in the statute creating the offence.

The following is a concise list of the statutes relating to forgery, and indictable offences connected with forgery, which have not already been mentioned under the foregoing precedents, and do not find a place in other parts of this work. It is necessary, however, to premise that, by the late stat. 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 1, (*ante, p.* 352), in all cases in which, by other statutes, the punishment of death is inflicted, that of transportation for life, or for not less than seven years, or imprisonment with or without hard labour and solitary confinement, (*s.* 26, *ante, p.* 355; *see* 7 *W.* 4 & 1 *Vict. c.* 84, *s.* 3, *Ib.*), for not more than four nor less than two years, is substituted, and that the punishment of imprisonment for life and forfeiture of lands, &c. in the stat. 5 *Eliz. c.* 14, is abolished, (*s.* 23, *ante, p.* 353), and that of transportation for fourteen or seven years or imprisonment, with or without hard labour and solitary confinement, for not more than two years nor less than one year, substituted in lieu thereof. It is also necessary to mention, that, by sect. 4 (*ante, p.* 368) of that act, where any person is made punishable with death for forging &c. any instrument or writing designated by a special name or description, which, however designated, is in law a will, testament, codicil, or testamentary writing, or a bill of exchange or promissory note for the payment of money, or an indorsement or assignment of a bill or note, or an acceptance of a bill of exchange, or an undertaking, warrant, or order for the payment of money, within the meaning of that act, such person may be indicted under that act, and punished accordingly. By the stat. 2 & 3 *W.* 4, *c.* 123, *ss.* 1, 2, (*ante, pp.* 353, 354), it was enacted, that all persons con-

victed of any offence, for which the stat. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, enjoined or authorized the punishment of death, should be transported for life, except for forging or uttering wills, &c., or powers of attorney for the transfer of stock, or receipt of dividends in the Bank, South-Sea House, or Bank of Ireland; and now, by the 7 *W.* 4 *&* 1 *Vict. c.* 84, *ss.* 1, 2, (*ante, pp.* 354, 355), these latter offences, and also all those which by the 2 *&* 3 *W.* 4, *c.* 123, were made punishable with transportation for life, are alike subject to transportation for life, or not less than seven years, or imprisonment for not more than four and not less than two years. With these observations, it has been thought best, in order to avoid repetition, to enumerate the existing statutes, with the punishments, in the terms, of the statutes respectively.

1. As to records, &c.—Avoiding records; felony. 8 *H.* 6, c. 12. Forging a memorial or certificate of registry of lands in Yorkshire or Middlesex; imprisonment for life, forfeiture of lands, &c. 2 *&* 3 *A. c.* 4, *s.* 19; 5 *&* 6 *A. c.* 18, *s.* 8; 7 *A. c.* 20. *s.* 15; 8 *G.* 2, *c.* 6, *s.* 21. Forging the seal, stamp, or signature of any certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or of any certified copy of any document, bye-law, entry in any register or other book, or other proceeding, receivable in evidence, or tendering in evidence any such certificate, &c. with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false and counterfeit; or forging the signature of any judge [of any of the superior courts of equity or common law] to any order, decree, certificate, or other judicial or official document, or tendering in evidence any order &c. with a false or counterfeit signature of any such judge thereto, knowing the same to be false or counterfeit: or printing any copy of any private act, or of the journals of either house of parliament, which shall falsely purport to have been printed by the printers to the Crown or to either house of parliament, or tendering in evidence any such copy, knowing that the same was not printed by the person by whom it purports to have been printed: felony, transportation for seven years, or imprisonment for not more than three years nor less than one year, with hard labour. 8 *&* 9 *Vict. c.* 113, *s.* 4. Certifying as true any false copy of or extract from any of the records in the public record office: felony, transportation for life or not less than seven years, or imprisonment not exceeding four years. 1 *Vict. c.* 94, *ss.* 19, 20. Uttering a false certificate of a previous conviction; felony, transportation, or imprisonment, and whipping. 7 *&* 8 *G.* 4, *c.* 28, *s.* 11.

2. As to the revenue, &c.—Forging the stamps on paper, &c., playing cards, gold and silver plates, newspapers, &c.; felony, transportation for life or not less than seven years, or imprisonment for not less than three years. 52 *G.* 3, *c.* 143, *ss.* 7, 8; 55 *G.* 3, *c.* 184, *s.* 7; 55 *G.* 3, *c.* 185, *ss.* 6, 7; 6 *G.* 4, *c.* 116; 4 *&* 5 *Vict. c.* 58, *s.* 1. *See R.* v. *Ogden*, 6 *C. & P.* 631: *R.* v. *Hope*, 1 *Mood. C. C.* 396. Forging debentures or certificates for payment or return of money required by statutes relating to the customs or excise; felony, death; 52 *G.* 3, *c.* 143, *s.* 10; or the name or hand-writing of any receiver or comptroller of the customs or their agents, to any draft, &c. for receiving money at the Bank of England on account of the receiver-general; felony, transportation for life; 8 *&* 9 *Vict. c.* 85,

*s.* 26; *see* 7 *W.* 4 & 1 *Vict. c.* 84, *s.* 2. Forging excise permits; misdemeanor, transportation for seven years, or fine and imprisonment: 2 *W.* 4, *c.* 16, *ss.* 3, 4. Knowingly having possession of forged dies or stamps resembling dies or stamps used to denote any stamp duty; felony, transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years. 3 & 4 *W.* 4, *c.* 97, *s.* 12. Fraudulently writing any matter liable to stamp duty on an old stamp; felony, transportation for seven years. 12 *G.* 3. *c.* 48. Counterfeiting, &c. stamps on paper &c. in respect whereof any excise duty is imposed, 1000*l.* fine. 2 & 3 *Vict. c.* 23, *s.* 42. Forging the certificates and receipts relating to Exchequer bills; felony, transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years. 5 *Vict. c.* 8, *s.* 26. Forging registers, certificates, transfers of annuities, &c. granted by the commissioners for the reduction of the national debt; felony. 10 *G.* 4, *c.* 24, *s.* 41. Forging the stamp on linens, calicoes, stuffs; felony, death. 10 *A. c.* 19, *s.* 97; 13 *G.* 3, *c.* 56, *s.* 5. *See* 52 *G.* 3, *c.* 142, *s.* 1. Forging the stamp on cambrics, &c.; felony, death. 4 *G.* 3, *c.* 87. Forging the handwriting of the receiver-general of the post-office or his agents, to any draft, &c., for money, or any such draft, &c.; felony, transportation for life or not less than seven years, or imprisonment for not more than four years. 7 *W.* 4 & 1 *Vict. c.* 36, *ss.* 33, 41. Forging or fraudulently using plates or dies used for marking postage; felony, transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years. 3 & 4 *Vict. c.* 96, *s.* 22. Forging stage carriage plates or licenses; misdemeanor, fine and imprisonment. 2 & 3 *W.* 4, *c.* 120, *ss.* 32, 33; 1 & 2 *Vict. c.* 79, *s.* 12. Forging a hawker's license; three hundred pounds fine. 54 *G.* 3, *c.* 41, *s.* 18. Forging declarations of return of insurance; felony, transportation for seven years. 54 *G.* 3, *c.* 133, *s.* 10.

3. As to public offices.—Forging the name of the registrar of the high Court of Admiralty, or the Bank receipts for suitors' money; felony. 53 *G.* 3, *c.* 151, *s.* 12. Forging the hand of the accountant-general, registrar, &c., of the high Court of Chancery, or of the cashier of the Bank, to any instrument relating to suitors' money; felony, death. 12 *G.* 1, *c.* 32, *s.* 9. Forging the hand of the accountant-general of the Exchequer; felony, death. 1 *G.* 3, *c.* 35. Forging the handwriting of the receiver-general of the excise, or excise comptroller of cash, or other person duly authorized, to any draft, &c. upon the Bank of England; felony, death. 7 & 8 *G.* 4, *c.* 53, *s.* 56. Forging the handwriting of the receiver-general or comptroller-general of the customs, or any person acting for them, to any draft, &c., upon the Bank; felony, death. 3 & 4 *W.* 4, *c.* 51, *s.* 27. Forging the handwriting of the receiver-general of the stamp duties, or of his clerk, or of the commissioners of stamps, to any draft, &c., upon the Bank; felony, death. 46 *G.* 3, *c.* 76, *s.* 9. Forging the handwriting of the treasurer, or other signing or vouching officer of the navy, to any paper whereby her Majesty's naval treasure may be paid or disposed of. *See* 1 *G.* 1, *st.* 2, *c.* 25, *s.* 6. Forging the handwriting of the treasurer of the ordnance, &c., to any draft, &c., on the Bank; felony, death. 46 *G.* 3, *c.* 45, *s.* 6. Forging the handwriting of the receiver-general of the post-office, &c., to any draft, &c., on the Bank; felony, death. 46 *G.* 3, *c.* 83,

*s.* 9; 47 *G.* 3, *st.* 2, *c.* 59, *s.* 3. Forging the handwriting of the adjutant-general of the volunteers and local militia, &c., to any draft, &c., on the Bank; felony, death. 54 *G.* 3, *c.* 151, *s.* 16. Forging the handwriting of the surveyor-general of the woods and forests, &c., to any draft, &c., on the Bank; felony, death. 46 *G.* 3, *c.* 143, *s.* 14. Forging the marking or handwriting of the receiver-general of the prefincs upon any writ of covenant; felony, death. 52 *G.* 3, *c.* 143, *s.* 5. Forging any contracts, certificates, receipts, &c., relating to the redemption of the land-tax; felony, death. 52 *G.* 3, *c.* 143, *s.* 6. Forging any declaration, warrant, order, or other instrument, or any affidavit or affirmation required to be made by the commissioners for the reduction of the national debt, or any certificate or order of their officers, &c., felony, death. 2 *&* 3 *W.* 4, *c.* 59, *s.* 19; *see* 7 *W.* 4 *&* 1 *Vict. c.* 84, *s.* 1. Forging any certificate of a receipt given to or by the commissioners for relief to the West India Islands; 2 *&* 3 *W.* 4, *c.* 125, *s.* 64; or to or by the commissioners for relief to the Island of Dominica; 5 *&* 6 *W.* 4, *c.* 51, *s.* 5; felony, death. *See* 7 *W.* 4 *&* 1 *Vict. c.* 84, *s.* 1. Forging any receipts for compensation money to slave-owners; felony, death. 5 *&* 6 *W.* 4, *c.* 45, *s.* 12; *see* 7 *W.* 4 *&* 1 *Vict. c.* 84, *s.* 1.

4. As to officers in the navy and army.—Forging any ticket, pay list, extract from the ship's books, certificate, inspector's cheque, or any letter of attorney, assignment or authority, in order to obtain any wages, pay, prize-money, &c., due or supposed to be due, for the services of any naval officer, seaman, or marine; or any purser's certificate to or other approval of, a bill of exchange, required by this act; or any receipt for wages, in respect of services on board any of her Majesty's ships; or the name or handwriting of any officer of the navy or marines to any receipt for half pay, of any widow to any receipt for a pension, or of any person to any receipt for an allowance from the compassionate fund; felony, transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years. 11 *G.* 4 *&* 1 *W.* 4, *c.* 20, *s.* 83. Forging any extract from any register of baptism or burial, or certificate thereof, to sustain any claim to wages, pay, prize-money, &c. due for the services of any officer, seaman, or marine in the navy, or half pay, pension, &c., &c.; felony, transportation for fourteen, or not less than seven years, or imprisonment for not more than three years nor less than one year. *Id. s.* 86, Forging the name or handwriting of any officer, soldier, &c. in the army, or of any officer or serjeant at Chelsea Hospital, as to the payment of pensions, wages, pay, &c., or any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, &c., concerning the payment or obtaining any pension, &c.; felony, transportation. 7 *G.* 4, *c.* 16, *s.* 38. *See Reg.* v. *Pringle*, 2 *Mood. C. C.* 127: 9 *C. & P.* 408.

5. As to public trade.— Forging Mediterranean passes; felony, death. 4 *G.* 2, *c.* 18, *s.* 4. As to forgeries on the London and Royal Exchange Insurance Companies, *see* 6 *G.* 1, *c.* 18, *s.* 13: the Globe Insurance, 39 *G.* 3, *c.* 83, *s.* 22; the English Linen Company, 4 *G.* 3, *c.* 37, *s.* 15; the British Society for extending the Fisheries, &c., 26 *G.* 3, *c.* 106, *s.* 26; the British Plate Glass Manufactory, 13 *G.* 3, *c.* 38, *s.* 28; 38 *G.* 3, *c.* 17, *s.* 23. There are other statutes with respect to forgeries upon particular companies, but these are now im-

material; for the recent act, 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 28, (*ante, p.* 350), extends to bodies corporate, or companies or societies of persons not incorporated, and to any person or number of persons whatsoever, who may be intended to be defrauded, whether they reside and carry on business in England or elsewhere. Forging a shipping license, penalty 500*l.* 47 *G.* 3, *sess.* 2, *c.* 66, *s.* 26. Forging quarantine certificates; felony. 6 *G.* 4, *c.* 78, *s.* 25. Forging certificates, &c., mentioned in the act for the abolition of the slave trade; felony. 6 *G.* 4, *c.* 78, *s.* 25. Forging or counterfeiting any die for marking gold or silver wares, or marking such wares with a forged die, or forging the mark of any such die, or transposing or removing the marks, or cutting or severing the marks with intent to affix them on other wares, or affixing any mark cut from other wares, or fraudulently using genuine dies; felony, transportation for not more than fourteen nor less than seven years, or imprisonment, with or without hard labour, not exceeding three years. 7 *&* 8 *Vict. c.* 22, *s.* 2. Forging alehouse certificates; misdemeanor. 3 *G.* 4, *c.* 77, *s.* 2. Bankrupts destroying, mutilating, or falsifying their books, &c., in contemplation of bankruptcy, and with intent to defraud their creditors; misdemeanor, imprisonment for not more than three years. 5 *&* 6 *Vict. c.* 122, *s.* 34.

6. As to the instruments of forging.—To make or have any frame, &c., for the making of paper, with the words "Bank of England" visible on the substance, or to make paper with curved or waving bar or wire lines, &c., or to make, &c., or sell, &c., such paper, &c.; felony, transportation for fourteen years. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 13. (*See s.* 14). To engrave on any plate, &c., any bank note, &c., or blank bank note, bill, &c., or use and have possession of such plate, &c., or utter or have paper upon which a blank bank note, &c., shall be printed: felony, transportation for fourteen years. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 15. To engrave on any plate &c., any word, number, figure, character, or ornament, resembling any part of a bank note, &c., or use or have such plate, &c., or utter or have any paper on which there shall be an impression of any word, &c., felony, transportation for fourteen years. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 16. To make use of or have possession of any frame, &c., for the making paper, with the name or firm of any person or persons, body corporate, or company, carrying on business as bankers, appearing on the substance; or to make, sell, &c., or have possession of such paper; felony, transportation for fourteen or seven years, or imprisonment for three years or one year. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 17. To engrave on any plate, &c., any bill of exchange or promissory note of any bankers, &c., any words resembling the subscription thereto, or use such plate, &c., or sell or have any paper on which any part of such bill, &c., shall be printed; felony, transportation for fourteen or seven years, or imprisonment for three years or one year. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 18. To engrave plates, &c., for foreign bills or notes, or use or have such plates, or utter any paper on which any part of such bill, &c., may be printed; felony, transportation for fourteen or seven years, or imprisonment for three years or one year. 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 19. *See R.* v. *Warshaner,* 1 *Mood. C. C.* 466: *R.* v. *Harris,* 7 *C. & P.* 416, 429: *Reg.* v. *Hannon,* 2 *Mood. C. C.* 77; 9 *C. & P.* 11. As to the instruments for forging stamps,

&c., *see* 3 & 4 *W.* 4, *c.* 97, *s.* 12; *and Reg.* v. *Allday*, 8 *C.* & *P.* 136.

All these statutes, with very few exceptions, make the uttering these forged instruments respectively, knowing them to be forged, equally penal with forging them.

## Sect. 8.

### FALSE PERSONATION.

### PERSONATING SEAMEN, SOLDIERS, &c.

*Statutes.*

11 *G.* 4 & 1 *W.* 4, *c.* 20, *s.* 84—*Personating Seamen, &c.*]—Enacts, that if any person shall falsely and deceitfully personate any commission, warrant, or petty officer, or seaman, or commission or non-commissioned officer of marines, or marine, or the wife, widow, or relation, or the executor, administrator, or creditor of any such officer, seaman, or marine, or any person entitled to any allowance from the compassionate fund of the navy, in order to receive any wages, pay, half-pay, prize-money, bounty-money, pension, or any part thereof, gratuity, or other allowance for money due or payable, or supposed to be due or payable, to any such officer, seaman, or marine, or any allowance to any person from the said compassionate fund, with intent to defraud any person whomsoever, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas, for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years.

Sect. 88.—*Accessaries—Place and Mode of Imprisonment*]—In every case of every offence made felony by this act, every principal in the second degree, and every accessary before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable, and every accessary after the fact to any such felony shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and where any person shall be convicted of any offence punishable under this act, for which imprisonment shall or may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement, for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet. *See* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

7 *G.* 4, *c.* 16, *s.* 38—*Personating Soldiers, &c.*]—If any person

shall willingly and knowingly personate or falsely assume the name or character, or procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person, entitled, or supposed to be entitled, to any pension, wages, pay, grant, or other allowance of money, prize-money, or relief, due or payable, or supposed to be due or payable, for or on account of any service done, or supposed to be done, by any such officer, non-commissioned officer, soldier, or other person as aforesaid, in his Majesty's army or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order fraudulently to receive any pension, wages, pay, grant, or other allowance of money, prize-money, or relief due or payable, or supposed to be due or payable, for or on account of any services done, or supposed to be done, by any such officer, non-commissioned officer, soldier, or other person as aforesaid, every such person so offending, being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall and may be transported for life, or for such term of years as the court shall adjudge.

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### *Indictment for personating a Seaman.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, did falsely, feloniously, and deceitfully personate one J. N., a seaman (*"any commission, warrant, or petty officer, or seaman, or commission or non-commissioned officer of marines or marine, or the wife, widow, or relation, or executor, administrator, or creditor of any such officer, seaman, or marine, or any person entitled to any allowance from the compassionate fund of the navy"*), in order to receive certain wages (*"any wages, pay, half-pay, prize-money, bounty-money, pension, or any part thereof, gratuity, or other allowance for money"* then and there due and payable (*"due or payable, or supposed to be due or payable"*) to the said J. N., with intent then and there and thereby to defraud the said J. N. (*"any person whomsoever"*); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a second count, similar to the first, substituting the words* "supposed to be due and payable" *for the words* "due and payable."

*Felony, transportation for life or not less than seven years, or imprisonment not exceeding four nor less than two years, with or without hard labour, and with or without solitary confinement,* 11 *G.* 4 *&* 1 *W.* 4, *c.* 20, *s.* 88, *such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 4, (*ante, p.* 169).

*In indictments for the personation of soldiers, &c., the intent may be laid to defraud "the Lords and others, Commissioners of the Royal Hos-*

*pital for soldiers at Chelsea, in the county of Middlesex.*" 7 *G.* 4, *c.* 16, *s.* 31.

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that J. N. was a seaman on board the ship mentioned, and that the wages attempted to be obtained were due and payable to him, or, under the second count, that they might be supposed to be due and payable to him. *See R.* v. *Brown,* 2 *East, P. C.* 1007: *R.* v. *Tannet, R. & R.* 351. Prove that the defendant personated or assumed the name and character of J. N. The offence will be complete, though the personated seaman be dead; *R.* v. *Martin, R. & R.* 324; and even though the wages have been paid. *R.* v. *Cramp, Id.* 327. So, upon an indictment on the 7 *G.* 4, *c.* 16, *s.* 38, for forging the name of a person to a letter of attorney, for the receipt of a pension "supposed to be due" to such person, it was held that the defendant was rightly convicted, although it appeared that no such pension was actually existing. *Reg.* v. *Pringle,* 2 *Mood. C. C.* 127.

The offence of personating is not confined to the person only who personates the seaman: all persons who aid and abet in the offence are principals. *R.* v. *Potts, R. & R.* 353.

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PERSONATING OWNERS OF STOCK, &c.

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*Statute.*

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 6.]—(*Ante, p.* 379).

Sect. 7]—Enacts, that if any person shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England or at the South Sea House, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter or act of parliament, or any owner of any dividend payable in respect of any such share or interest as aforesaid and, shall thereby endeavour to transfer any share or interest belonging to any such owner, or thereby endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

*Indictment.*

*Commencement as ante, p.* 355]—in the county aforesaid, feloniously did falsely and deceitfully personate one J. N., the said J. N. then and there being the owner of a certain share and interest in certain

stock and annuities, which were then transferable at the Bank of England, to wit, [*state the amount and nature of the stock*]; and that the said J. S, thereby did then and there transfer the said share and interest of the said J. N. in the said stock and annuities, as if he the said J. S. were then and there the lawful owner thereof; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony.* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 6, (*ante, p.* 379).—*An indictment for an offence under the 7th section may easily be framed from the above precedent.*

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove the personation and the transfer, as stated in the indictment.



PERSONATING BAIL, &C.



*Statute.*

11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 11]—Enacts, that if any person shall, before any court, judge, or other person lawfully authorized to take any recognisance or bail, acknowledge any recognisance or bail in the name of any other person not privy or consenting to the same, whether such recognisance or bail in either case be or be not filed; or if any person shall, in the name of any other person not privy or consenting to the same, acknowledge any fine, recovery, cognovit actionem, or judgment, or any deed to be inrolled; every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported across the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

*Indictment.*

*Commencement as ante, p.* 355]—in the county aforesaid, before the right honourable Sir James Parke, knight, one of the Barons of her Majesty's Court of Exchequer, at Westminster, (the said Sir James Parke, knight, then and there having lawful authority to take any recognisance of bail in any suit then depending in the said court), then and there feloniously did acknowledge a certain recognisance of bail, in the name of J. N., in a certain cause then depending in the said court, wherein A. B. was plaintiff and C. D. defendant, he the said J. N. not being then and there privy or consenting to the said J. S., so acknowledging such recognisance in his name as aforesaid; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life or for not less than seven years, or imprisonment for not more than four nor less than two years,* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 11, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one*

*time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove the pendency of the action by producing the writ, or, if it have been returned, by an examined copy. Prove that J. S. became bail in the name of J. N. by producing the bail-piece, and the identity of J. S. as the person who became bail, and call J. N. to shew that he did not consent, and was not privy to J. S. becoming bail in his name.

*As to personation of voters at parliamentary and municipal elections, see the* 2 *W.* 4, *c.* 45, *s.* 58; 5 *&* 6 *W.* 4, *c.* 76, *s.* 34; 6 *&* 7 *Vict. c.* 18, *ss.* 84, 86—89: *Reg.* v. *Thompson*, 2 *M. & Rob.* 355.

## CHAPTER II.

### OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.



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### SECT. 1.

#### MURDER.

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*Statutes.*

9 *G.* 4, *c.* 31, *s.* 8—*Venue*]—Enacts, that where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessary before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in Englandin which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place.

Sect. 2—*Petit Treason to be treated as Murder*]—Enacts, that every offence which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or accessaries, shall be dealt with, indicted, tried, and punished as principals and accessaries in murder.

Sect. 3—*Punishment*]—Enacts, that every person convicted of murder, or of being accessary before the fact to murder, shall suffer death as a felon. And every accessary after the fact to murder shall be liable, at the discretion of the court, to be transported beyond the

seas for life, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

6 & 7 *W.* 4, *c.* 30, *s.* 1—*Period of Execution*]—*Recites and repeals stat.* 9 *G.* 4, *c.* 31, *s.* 4, (*which enacted that every person convicted of murder should be executed according to law on the day next but one after that on which the sentence should be passed, unless the same should happen to be Sunday, and in that case on the Monday following; and the body of every murderer should, after execution, either be dissected or hung in chains, as to the court should seem meet; and sentence should be pronounced immediately after the conviction of every murderer, unless the court should see reasonable cause for postponing the same; and such sentence should express not only the usual judgment of death, but also the time hereby appointed for the execution thereof, and that the body of the offender should be dissected or hung in chains, whichsoever of the two the court should order: Provided always, that after such sentence shall have been pronounced, it shall be lawful for the court or judge to stay the execution thereof, if such court or judge shall so think fit*); *and* sect. 2—enacts, that from and after the passing of this act, sentence of death may be pronounced, after conviction for murder, in the same manner, and the judge shall have the same power in all respects, as after convictions for other capital offences.

2 & 3 *W.* 4, *c.* 75, *s.* 16—*Form of Judgment*]—Whereas an act was passed in the ninth year of the reign of his late Majesty, for consolidating and amending the statutes in England, relative to offences against the person, by which act it is enacted, that the body of every person convicted of murder shall, after execution, either be dissected or hung in chains, as to the court which tried the offender shall seem meet; and that the sentence to be pronounced by the court shall express that the body of the offender shall be dissected or hung in chains, whichsoever of the two the court shall order; be it enacted that so much of the said last recited act as authorizes the court, if it shall see fit, to direct that the body of a person convicted of murder, shall, after execution, be dissected, be and the same is hereby repealed; and that in every case of conviction of any prisoner for murder, the court before which such prisoner shall have been tried shall direct such prisoner either to be hung in chains, or to be buried within the precincts of the prison in which such prisoner shall have been confined after conviction, as to such court shall seem meet; and that the sentence to be pronounced by the court shall express that the body of such prisoner shall be hung in chains, or buried within the precincts of the prison, whichever of the two the court shall order.

4 & 5 *W.* 4, *c.* 26, *s.* 1—*Murderers not to be hung in chains*]—*Recites stat.* 9 *G.* 4, *c.* 31, *ss.* 4, 5; 2 & 3 *W.* 4, *c.* 75, *s.* 15, and enacts, that so much of the said recited act made and passed in the ninth year of the reign of his Majesty King George the Fourth, as authorizes the court to direct that the body of a person convicted of murder should, after execution, be hung in chains, and also so much of the said recited act made and passed in the second and third years of the reign of his present Majesty, as provides, that in every case of conviction of any prisoner for murder, the court shall direct such

prisoner to be hung in chains, shall be and the same is hereby repealed.

*Indictment for Murder, by Stabbing.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and our said lady the Queen then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that the said J. S., with a certain knife, of the value of sixpence, which he the said J. S. in his right hand then and there had and held, the said J. N., in and upon the left side of the belly, between the short ribs of him the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said J. N., then and there, with the knife aforesaid, in and upon the said left side of the belly, between the short ribs of him the said J. N., one mortal wound of the breadth of three inches, and of the depth of six inches; of which said mortal wound the said J. N., from the said third day of August, in the year aforesaid, until the fifteenth day of the same month of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live; on which said fifteenth day of August, in the year aforesaid, the said J. N., at the parish aforesaid, in the county aforesaid, of the said mortal wound died: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. the said J. N., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p. 403. Upon this indictment the defendant may be acquitted of the murder, and found guilty of manslaughter. A defendant who is indicted for murder, but acquitted of that charge on the ground that he was not present when the fatal blow was given, though he had previously assaulted the deceased, cannot on that indictment be convicted of an assault, under the* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, *which applies only to assaults which are involved in the felony charged. Reg.* v. *Phelps,* 2 *Mood. C. C.* 240; *C. & Mar.* 180: *see Reg.* v. *M'Phane, Id.* 212: *Reg.* v. *Crumpton, C. & Mar.* 597. *But it seems that he may be convicted of an assault committed by him in the course of the transaction which is charged as the murder, although the defendant be acquitted of the murder on the ground that the death is not proved to have been the consequence of the defendant's acts on that occasion. Reg.* v. *Lewis,* 1 *C. & K.* 419.

*Felony, death.* 9 *G.* 4, *c.* 31, *s.* 3. *By stat.* 2 *&* 3 *W.* 4, *c.* 75, *s.* 16, *the sentence must express that the body of the convict be buried within the precincts of the prison; but by stat.* 6 *&* 7 *W.* 4, *c.* 30, *s.* 2, *the sentence may be pronounced in the same manner, and the judge has the same power in all respects, as after conviction for other capital offences. This latter provision would seem to empower the judge to direct the sentence to be recorded under stat.* 4 *G.* 4, *c.* 48, *s.* 1, (*ante, p.* 251), *see Reg.* v. *Hogg,* 2 *M. & Rob.* 380, *and would perhaps be held to repeal the provision applicable to*

*burying within the precincts of the prison. Under the old law, where the judge, having mistaken the time of execution, called the defendant again to the bar and rectified it, it was holden by some of the judges that the statute was in this respect merely directory, and that the judge might order the defendant to be executed at any time within forty-eight hours; but all the judges were of opinion that a mistake in this respect might be rectified at any time during the assizes. R.* v. *Wyatt, R. & R.* 230. *But where the judge had omitted that part of the sentence which formerly related to dissection, it was doubted whether it was not an essential part of the sentence, and the defendant was pardoned. R.* v. *Fletcher, R. & R.* 58. *In R.* v. *Garside,* 2 *Ad. & E'l.* 266, *the sheriff of the city of Chester refused to execute the prisoners, who were removed by habeas corpus in the court of King's Bench, and executed by the marshal of the Marshalsea, assisted by the sheriff of Surrey. See* 5 & 6 *W.* 4, *c.* 1, *s.* 1.

*The offence of murder is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence for the Prosecution.*

*In and upon one J. N.*]—It must be proved that J. N. was the person killed, otherwise the defendant must be acquitted. (*Ante, p.* 30). If the name of the deceased be unknown, it should be stated so in the indictment. *Ib.*

*In the Peace of God and our said lady the Queen*]—This does not require proof. If the deceased, however, were an alien enemy, and killed in the actual heat and exercise of war, this is matter of justification, which may be proved on the part of the defendant. *See* 1 *Hale,* 433. But it is no matter either of excuse or justification, that the deceased was a Jew, an outlaw, or one attainted of felony or præmunire. *Ib.*

*With a certain Knife, &c.*]—It is not necessary to prove this strictly as laid: if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill, or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material. *R.* v. *Mackally,* 9 *Co.* 67*a; Gilb. Ev.* 231. And it may be observed, that, on an indictment for cutting, &c., with intent to murder, under the stat. 9 *G.* 4, *c.* 31, *s.* 12, it has been holden that the instrument or means by which the injury was inflicted need not be stated in the indictment, and if stated, do not confine the prosecutor to prove an injury by such means. *R.* v. *Briggs,* 1 *Mood. C. C.* 318: (*see post, Sect. III*). But if the species of death would be different, as if the indictment allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance would be fatal; *Ib.*; and the same, if the indictment state a poisoning, and the evidence prove a starving. Thus, where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave him divers mortal blows and bruises, of which he died, and it appeared in evidence that the death was caused by the deceased falling on the ground, in consequence of a blow on the head received from the defendant, it was holden that the cause of the death was not properly stated. *R.* v. *Thompson,* 1 *Mood. C. C.* 139.

And the same where an indictment charged that the defendant struck the deceased with a brick, and it appeared that he knocked the deceased down with his fist, and that the deceased fell upon a brick, which caused his death. *R.* v. *Kelly*, 1 *Mood, C. C.* 113. Upon an indictment for shooting with a pistol loaded with gunpowder and a leaden bullet, it appeared that there was no bullet in the room where the act was done, and no bullet in the wound; and it was proved that the wound might have been occasioned by the wadding of the pistol; *Bolland*, B., *Park* and *Parke*, Js., held the indictment not proved. *R.* v. *Hughes*, 5 *C. & P.* 126. But if the indictment allege a death by one kind of poison, proof of a death by another kind of poison will support the indictment. *Ib.; and see* 2 *Hale*, 185, 115; 2 *Hawk*, *c.* 23, *s.* 84. And where an indictment for the murder of a bastard child stated that the defendant forced and thrust moss and dirt into its throat, mouth, and nose, and that by forcing and thrusting the moss and dirt into the throat, mouth, and nose of the child, the child was choked, &c., and it appeared that the child was not immediately suffocated by the moss and dirt, but that the moss and dirt caused an injury and inflammation in the throat, which closed the passage to the lungs and stomach, of which the child died; it was holden that the evidence supported the indictment, and that it was sufficient to state the proximate cause of the death, without stating the intermediate process resulting from that proximate cause. *R.* v. *Tye*, *R. & R.* 345. Where an indictment charged that the prisoner, with both her hands about the neck of the deceased, the neck and throat of the deceased did squeeze and press, and by such squeezing, &c., did suffocate and strangle the deceased; and the evidence was, that the prisoner suffocated the deceased by placing one hand on his mouth and the other on the back of his head: *Patteson*, J., held that it was sufficient if the death was caused by suffocation, and that the evidence supported the indictment. *R.* v. *Culkin*, 5 *C. & P.* 121. Where the indictment alleged that the defendant suffocated the deceased by placing her hand on the mouth of the deceased, and the jury found that the death was caused by suffocation, but could not say how it was occasioned, *Denman*, C. J., held the indictment proved. *R.* v. *Waters*, 7 *C. & P.* 250. So, where the indictment charged the offence to have been committed with a certain sharp instrument, and the evidence was that the wound was partly torn and partly cut, and was done with an instrument not sharp, *Parke*, B., held the indictment proved, and said the degree of sharpness was immaterial. *R.* v. *Grounsell*, 7 *C. & P.* 788. Where the prisoner was indicted for cutting the throat of the deceased, and a surgeon proved that what was technically called the throat was not cut, as the wound did not extend so far round the neck, *Patteson*, J., held that the indictment must be understood to mean what is commonly called the throat. *R.* v. *Edwards*, 6 *C. & P.* 401.

The value of the instrument is immaterial. It seems to be stated in the indictment, because the instrument is forfeited as a deodand to the Queen, and the township is liable for the value of it, if it be not forthcoming. *See* 2 *Hale*, 185.

*In his right Hand, &c.*]—It is stated to be necessary to allege in the indictment in which hand the defendant held the weapon; 2 *Hale*, 185; but it is not necessary to prove it; and therefore the

want of this allegation can now only be objected to by demurrer. 7 *G.* 4, *c.* 64, *s.* 20. (*See ante, p.* 83).

*In and upon the right Side*]—The indictment must shew, with certainty, in what part of the body the deceased was wounded; and therefore, if it allege the wound to have been on the arm, hand, or side, without saying whether the right or the left, it is bad. 2 *Hale*, 185. In this and other instances, there is a particularity required in an indictment for murder, which it would be ridiculous to attempt to account for or justify; for the same strictness is not required as to the evidence necessary to support it: if, for instance, the wound be stated to be on the left side, and proved to be on the right, or alleged to be on one part of the body, and proved to be on another, the variance is immaterial; 2 *Hale*, 186; and for this reason, the objection can now only be taken by demurrer. 7 & 8 *G.* 4, *c.* 64, *s.* 20. (*See ante, p.* 83).

*Of his Malice aforethought*]—The law presumes every homicide to be murder, until the contrary appears. *Fost.* 255. Therefore the prosecutor is not bound to prove malice, or any facts or circumstances beside the homicide, from which the jury may presume it; and it is for the defendant to give in evidence such facts and circumstances as may prove the homicide to be justifiable, or excusable, or that at most it amounted to but manslaughter. (*See post, p.* 409 *et seq.*)

*Did strike and thrust*]—In all cases where the death is caused by personal violence, it is essential to the indictment that it should allege that the defendant struck the deceased; *see* 5 *Co.* 122 *a*; 2 *Hale*, 184; 2 *Hawk. c.* 23, *s.* 82; and it must also be proved. But we have seen, (*ante, p.* 406), that it is not necessary to prove that he struck him with the particular instrument mentioned in the indictment; and therefore, although the indictment allege that the defendant did strike and thrust, proof of a striking which produced contused wounds only would maintain the indictment.

In cases of express malice, the homicide is usually committed in secret, and it is rarely practicable to substantiate it by direct and positive testimony; in most cases, the defendant is convicted upon circumstantial evidence merely. Upon this subject it is only necessary to refer to what has been already said upon the doctrine of presumptions, (*ante, p.* 122), repeating here merely the rule laid down by Lord Hale, never to convict a man of murder or manslaughter on circumstantial evidence alone, unless the body have been found. 2 *Hale*, 290. *See Reg.* v. *Hopkins*, 8 *C.* & *P.* 591.

In cases of implied malice, (*vide post, p.* 412), the homicide is usually committed in the presence of others, who may prove it; if not, it must be proved by circumstantial evidence.

*One mortal Wound of the Breadth &c.*]—It was formerly considered to be necessary to state, in an indictment for murder, the length and breadth of the wound in all cases where it was possible to do so; but not where a limb was cut off, or the wound was a contused wound merely. 2 *Hale*, 186. But it never was necessary to prove the wound as laid; *Ib.*; and it has now been decided by

the judges, that it is not necessary to state in an indictment for murder the length, breadth, or depth of the wound. *R.* v. *Mosley*, 1 *Mood. C. C.* 97.

*Of which said mortal Wound, &c.*]—The dates here stated in the indictment need not be proved as laid. All that is necessary to be proved, in order to support this part of the indictment is, that the deceased died of the wound or wounds given him by the defendant, within a year and day after he received them; for if he died after that time, the law would presume that his death had proceeded from some other cause than the wounds. 1 *Hawk. c.* 23, *s.* 90.

If a man be wounded, and the wound turn to a gangrene or fever for want of proper applications, or from neglect, and the man die of the gangrene or fever; or if it become fatal from the refusal of the party to undergo a surgical operation, *Reg.* v. *Holland*, 2 *M. & Rob.* 351; this is a homicide, and murder or not, according to the circumstances under which the wound was given. 1 *Hale*, 421. But, if it appeared that the man's death was caused by improper applications to the wound, and not by the wound itself, it would be otherwise, *Ib.*

An indictment against two defendants, which states the death to be the result of two different injuries inflicted by each of the defendants separately, on different days, is bad. *Reg.* v. *Devett*, 8 *C. & P.* 639.

*Evidence for the Defendant.*

The defendant has to prove, either that the murder was not committed by him, or that the offence actually committed does not amount to murder. This defence may be, and frequently is, made out by the examination in chief of the witnesses for the prosecution; but if not, it may be proved from their cross-examination, or by witnesses called upon the part of the defendant.

We have seen (*ante, p.* 408) that the prosecutor is not bound to prove that the homicide was committed from malice prepense; if he prove the homicide merely, the law from thence presumes the malice. The malice in such a case, however, is only presumed; and the defendant may rebut that presumption, by proving that the homicide was *justifiable, or excusable*, or that at most it amounted to *manslaughter* only, and not to *murder*.

*Justifiable homicide* is of three kinds:—1. Where the proper officer executes a criminal, in strict conformity with his sentence. 2. Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible and atrocious crime: as, for instance, if a man attempt to rob or murder another, and be killed in the attempt, the slayer shall be acquitted and discharged. *See Bract.* 145; 1 *Hale*, 488; 9 *G.* 4, *c.* 31, *s.* 10; (*post*, 441).

*Excusable homicide* is of two kinds:—1. Where a man doing a *lawful* act, without any intention of hurt, by accident kills another; as, for instance, where a man is working with a hatchet, and the head by accident flies off and kills a person standing by. This is called homicide *per infortunium*, or by misadventure. 2. Where a man

kills another upon a sudden rencounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling; which is termed homicide *se defendendo.* Formerly, if the defendant were found guilty of excusable homicide merely, he had a pardon and a writ of restitution of his goods, as a matter of right. And indeed, to prevent the expense of a pardon, &c., in cases where the death notoriously happened by misadventure or in self-defence, it was the practice to permit (if not direct) a general verdict of acquittal. *Fost.* 288; 4 *Bl. Com.* 188. But now no punishment or forfeiture is incurred by homicide *per infortunium*, or *se defendendo*, or in any other manner without felony. 9 *G.* 4, *c.* 31, *s.* 10, (*post, p.* 441).

*Manslaughter* is the unlawful and felonious killing of another, without any malice either expressed or implied. It is of two kinds: —1. Involuntary manslaughter, where a man, doing an *unlawful* act not amounting to felony, by accident kills another. 2. Voluntary manslaughter, where, upon a sudden quarrel, two persons fight, and one of them kills the other: or where a man greatly provokes another, by some personal violence, &c., and the other immediately kills him. Manslaughter is felony.

*Murder* is thus defined or described by Lord Coke (3 *Inst.* 47): "Where a person of sound memory and discretion—unlawfully killeth—any reasonable creature in being—and under the King's peace— with malice aforethought, either express or implied."

1. It must be committed by a person of sound memory and discretion; it cannot be committed by an idiot, lunatic, or infant, unless indeed he shew a consciousness of doing wrong, and of course a discretion or discernment between good and evil. 4 *Bl. Com.* 195, 126; 20, *et seq.*; 1 *Hawk. c.* 1. (*See ante, p.* 12). But if any person procure an idiot, &c., to murder another, the procurer is guilty of the murder, 1 *Hauk. c.* 31, *s.* 7, although, perhaps, not present at the time it was committed. (*See ante, p.* 3). It is no defence on behalf of a foreigner, charged in England with an offence committed here, that he did not know he was doing wrong, the act not being an offence in his own country. *R.* v. *Esop*, 7 *C. & P.* 456.

2. It must be an unlawful killing, not excusable or justifiable. It may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. 4 *Bl. Com.* 196; 1 *Hale*, 431. Taking away a man's life by perjury is not, it seems, in law, murder; *see R.* v. *Macdaniel, Fost.* 131; *and see* 4 *Bl. Com.* 196, *n.*; although *in foro conscientiæ*, it is as much so as killing with a sword. If a man, however, do any other act, of which the probable consequence may be, and eventually is, death, such killing may be murder, although no stroke were struck by himself: as was the case of the unnatural son who exposed his sick father to the air against his will, by reason whereof he died; 1 *Hawk. c.* 31, *s.* 5; of the harlot, who laid her child in an orchard, where a kite struck it and killed it; of the mother who hid her child in a pig-stye, where it was devoured; and of the parish officers, who moved a child from parish to parish till it died from want of care and sustenance. 1 *Hale*, 433; 4 *Bl. Com.* 197. So, where an apprentice died from harsh treatment, and want of care upon the part of his

master, whilst he was labouring under disease; this was holden to be murder in the master. *R.* v. *Squire & Ux.* 1 *Russ.* 426: *see R.* v. *Smith*, 8 *C. & P.* 153: *R.* v. *Cheeseman*, 7 *C. & P.* 455: *R.* v. *Saunders*, 7 *C. & P.* 277: *R.* v. *Marriott*, 8 *C. & P.* 425: *Reg.* v. *Edwards*, *Id.* 611; 1 *Russ.* 426. So, if one, under a well-grounded apprehension of personal violence, do an act which causes his death; as for instance, jumps out of a window, or into a river, he who threatened is answerable for the consequences. *R.* v. *Evans*, 1 *Russ.* 426: *Reg.* v. *Pitts*, *C. & Mar.* 284. If a man have a beast that is used to do mischief, and he, knowing it, suffer it to go abroad, and it kill a man, this, it seems, is manslaughter in the owner; but if he had purposely turned it loose, though merely to frighten people, and to make what is called sport, it is as much murder as if he had incited a bear or a dog to worry them. 1 *Hale*, 431; 4 *Bl. Com.* 197. If a man have a disease, which in all likelihood would terminate his life in a short time, and another give him a wound or hurt, which hastens his death, this is such a killing as constitutes murder. 1 *Hale*, 428. So, if a man be wounded, and the wound turn to a gangrene or fever, for want of proper applications, or from neglect, and the man die of the gangrene or fever; or if it become fatal from the refusal of the party to submit to a surgical operation; *Reg.* v. *Holland*, 2 *M. & Rob.* 351; this is also such a killing as would constitute murder; 1 *Hale*, 428; but otherwise if the death of the party were caused by improper applications to the wound, and not by the wound itself. *Ib.* And it is a general rule, that, to make the killing murder, the death must follow within a year and a day after the stroke or other cause of it.

3. The person killed must be "a reasonable creature in being, and under the King's peace." Therefore, to kill a child in its mother's womb is no murder; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it may be murder in the person who administered or gave them. 3 *Inst.* 50. So, if a mortal wound be given to a child whilst in the act of being born, for instance, upon the head as soon as the head appears, and before the child has breathed, it may be murder, if the child is afterward born alive and dies thereof. *R.* v. *Senior*, 1 *Mood. C. C.* 346. But it must be proved that the entire child has actually been born into the world in a living state; and the fact of its having breathed is not a conclusive proof thereof. *R.* v. *Sellis*, *Id.* 850: *R.* v. *Crutchley*, 7 *C. & P.* 814. But the fact of the child's being still connected with the mother by the umbilical cord will not prevent the killing from being murder. *R.* v. *Crutchley*, *supra: Reg.* v. *Reeves*, 9 *C. & P.* 25. *Reg.* v. *Trilloe*, 2 *Mood. C. C.* 260; *C. & Mar.* 650. As to the words "the King's peace," in the definition of murder, they mean merely that it is not murder to kill an alien enemy in time of war; 3 *Inst.* 50; 1 *Hale*, 433; but killing even an alien enemy within the kingdom, unless in the actual exercise of war, would be murder. 1 *Hale*, 433. So also, the killing a foreigner out of the Queen's dominions is murder, for which the defendant, if a British subject, is triable in this country under the stat. 9 *G.* 4, *c.* 31, *s.* 7. *Reg.* v. *Azzopardi*, 2 *Mood. C. C.* 288; 1 *C. & K.* 203.

4. And, lastly, the killing must be committed with malice aforethought. Malice is either express or implied. Express malice is when one, with a sedate and deliberate mind, and formed design,

doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as, lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. 1 *Hale*, 451. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shews him to be an enemy to mankind in general; as going deliberately with a horse used to strike, or discharging a gun amongst a multitude of people. 1 *Hawk. c.* 29, *s.* 12. So, if a man resolve to kill the next person he meets, and do kill him, it is murder, although he knew him not; for it is universal malice. 4 *Bl. Com.* 200. And it may be necessary here to observe, that no provocation, however great, will extenuate or justify a homicide, where there is evidence of express malice. *See R.* v. *Mason, Fost.* 132. So, where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him; upon which B. did strike, and A. thereupon killed him; this was holden to be murder. 1 *Hawk. c.* 31, *s.* 24.

And in many cases, where no malice is expressed or openly indicated, the law will imply it. Thus, where a man wilfully poisons another—in such a deliberate act the law presumes malice, though no particular enmity can be proved. 1 *Hale*, 455. So, if a man kill another suddenly, without any, or without a considerable, provocation; if he kill an officer of justice in the legal execution of his duty; or if, intending to do another *felony*, he undesignedly kill a man: in all these cases the law implies malice, and the offence is murder.

If two persons mutually agree to commit suicide together, and accordingly take poison or attempt to drown themselves together, but one only of them dies, the survivor is guilty of murder. *R.* v. *Dyson, R. & R.* 523: *Reg.* v. *Alison*, 8 *C. & P.* 418.

As there are many very nice distinctions, however, upon this subject of malice prepense, express, and implied, it may be desirable to consider the subject more fully and minutely, which we shall do under the following heads.

*Killing by Poison.*]—Of all the forms of death by which human nature may be overcome, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. 3 *Inst.* 48. And, therefore, in all cases where a man wilfully administers poison to another, 1 *Hale*, 455, or lays poison for him, and either he or another takes it, and is killed by it, *Id.* 466, the law implies malice, although no particular enmity can be proved. 4 *Com.* 34. So, if a person knowingly give poison to A. to administer as a medicine to B., but A. neglecting to do so, it is accidentally given to B. by a child or other unconscious agent, this is in law a poisoning by the party himself, as much as if he had administered it with his own hands. *Reg.* v. *Michael*, 2 *Mood, C. C.* 120; 9 *C. & P.* 356. If, however, it were administered by mistake, or if it were laid with an innocent intention in the place from which the deceased took it, it is merely homicide by misadventure. 'So, if a physician or surgeon give his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this also is neither murder nor manslaughter, but misadventure. *Mirr. c.* 4, *s.* 16. A distinction, indeed, has been taken between the administering a potion, &c., by a regular physician, &c., and one who is not so, and

the death in the latter case is said to be manslaughter at the least; *Brit. c.* 5; 4 *Inst.* 251; but Lord Hale very much questions the soundness of this distinction. 1 *Hale*, 430. And it seems, that if a person whether he be a regular practitioner or not, honestly and *bonâ fide* perform an operation which causes the patient's death, he is not guilty of manslaughter; *R.* v. *Van Butchell*, 3 *C. & P.* 629; but if he be guilty of criminal misconduct, arising from gross ignorance or criminal inattention, then he will be guilty of manslaughter. *R.* v. *Williamson*, *Id.* 635: *R.* v. *Spiller*, 5 *C. & P.* 333. In a recent case, *R.* v. *Long*, 4 *C. & P.* 398, where the defendant, not a regular physician, killed a woman by an application, and the jury found that he entertained a criminal disregard of human life, he was convicted of and punished for manslaughter. *See R.* v. *Long*, 4 *C. & P.* 423: *R.* v. *Senior*, 1 *Mood. C. C.* 346. In *R.* v. *Webb*, 1 *M. & Rob.* 405, Lord Lyndhurst laid down the following rule:—"In these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough in *R.* v. *Williamson*. I shall leave it to the jury to say, first, whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence." *See also Reg.* v. *Spilling*, 2 *M. & Rob.* 107.

*Killing by Fighting.*]—Killing by fighting may be either murder, or manslaughter, or homicide *se defendendo*, according to circumstances.

1. If two persons quarrel and afterwards fight, and one of them kill the other—in such a case, if there intervened, between the quarrel and the fight, a sufficient cooling time for passion to subside and reason to interpose, the killing would be murder; *Fost.* 296; 1 *Hale*, 453; but if such a time had not intervened—if the parties, in their passion, fought immediately or even if, immediately upon the quarrel, they went out and fought in a field, (for this is deemed a continued act of passion), the killing in such a case would be manslaughter only, 3 *Inst.* 51; 1 *Hale*, 453; 1 *Hawk*, c. 31, *s.* 29; *Fost.* 295, whether the party killing struck the first blow or not. *Fost.* 295; 1 *Hale*, 456.

Therefore, if two persons deliberately fight a duel, and one of them be killed, the other and his second are guilty of murder, 1 *Hale*, 442, 452; 1 *Hawk. c.* 31, *s.* 81: *see R.* v. *Oneby*, 2 *Str.* 766, no matter how grievous the provocation, or by which party it was given. 3 *East*, 581. The second of the deceased, also, is deemed guilty of murder, as being present aiding and abetting; although Lord Hale

seems to think the rule of law, as to principals in the second degree, too far strained in that case. 1 *Hale*, 442, 452. *See R.* v. *Murphy*, 6 *C. & P.* 103: *Reg.* v. *Young*, 8 *C. & P.* 645: *Reg.* v. *Cuddy*, 1 *C. & K.* 210.

And even in the case of a sudden quarrel, where the parties immediately fight, the case may be attended with such circumstances as will indicate malice on the part of the party killing; and the killing then would be murder, and not merely manslaughter. If, for instance, the party killing began the attack under circumstances of undue advantage—as if A. and B. quarrel, and A. draw his sword and make a pass at B., and B. thereupon draw his sword, and they fight, and B. is killed: A. would be guilty of murder; for his making the pass before B. had drawn his sword, shews that he sought his blood. *Fost.* 295. So, where A. and B. quarrelled, and A. threw a bottle at B., and then drew his sword, and B. then threw the bottle back at A. and wounded him, upon which A. immediately stabbed him; this was holden to be murder. *R.* v. *Mawgridge*, *Kel.* 128. But if the parties, at the commencement, attack each other upon equal terms, and afterwards, in the course of the fight, one of them in his passion snatch up a deadly weapon and kill the other with it; this would be manslaughter only. 1 *East*, *P. C.* 243: *R.* v. *Taylor*, 5 *Burr.* 2793; *R.* v. *Anderson*, 1 *Russ.* 531: *R.* v. *Kessal*, 1 *C. & P.* 437. Thus, where, after mutual blows between the defendant and the deceased, the defendant knocked the deceased down, and, after he was upon the ground, stamped upon his stomach and belly with great force, and thereby killed him: this was held to be only manslaughter. *R.* v. *Ayes*, *R. & R.* 166. Where the defendant and others quarrelled in a public-house, and there was an affray amongst them, and the defendant threw the deceased on the ground and was beating him severely, when some person calling to him not to murder the man, he said, "d— him, I will murder him," upon which one of the party gave the defendant a blow and knocked him down; the defendant then went into the yard, and in about a minute returned in a violent passion with a pitch-fork; in the meantime the deceased had armed himself with a fire shovel, and had struck one of the defendant's party on the head, when the defendant, not seeing the blow, returned from the yard, and from behind ran one of the groins of the fork into the deceased's temple, of which he died; it was doubted by some of the judges whether this was more than manslaughter, and accordingly the defendant was recommended for a conditional pardon. *R.* v. *Rankin*, *R. & R.* 43.

So, if there be any other circumstances in the case indicative of malice in the party killing, it will be murder. As, for instance, if two persons fight upon a sudden quarrel, and be separated, and one of them afterwards, having provided himself with a deadly weapon, lies in wait for the other, to have an opportunity, thus armed, to renew the quarrel, and they accordingly meet, quarrel, and fight, and the man who is armed kills the other, this is murder. *See R.* v. *Snow*, 1 *Leach*, 151; 1 *East*, *P. C.* 245. So, if two persons fight from malice, and pretend or feign a reconciliation, and they afterwards meet and suddenly fight upon the score of the old malice, and one of them be killed, this is murder, and not merely manslaughter. 1 *Hale*, 451. So, if B. challenge A., and A. refuse to meet him, but tell him that he shall be on his way to such a place upon busi-

ness at such a time, and B. meet him on his way and assault him, and they fight, and A. kills D.: if it appear that A. made this communication for the purpose of evading the law, by giving the fight the appearance of a sudden quarrel, the killing would be murder: but if the communication were made undesignedly, it would be manslaughter only. 1 *Hawk. c.* 31, *s.* 25.

2. A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act; and so are boxing and sword playing, the succeeding amusements of their posterity: *see R.* v. *Perkins*, 4 *C. & P.* 537: *R.* v. *Hargrave*, 5 *C. & P.* 170: *R.* v. *Murphy*, 6 *C. & P.* 103; therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is manslaughter. 4 *Bl. Com.* 183. But it is said, that if the King command or permit such diversion, the act being in that case lawful, the killing would be misadventure only. *Fost.* 259; *cont. Hale*, 472. But all struggles in anger, whether by fighting, wrestling, or in any other mode, are unlawful, and death occasioned by them is manslaughter at the least. *Reg.* v. *Canniff*, 9 *C. & P.* 359.

3. If two men fight upon a sudden quarrel, and one of them after a while endeavour to avoid any further struggle, and retreat as far as he can, until at length no means of escaping his assailant remain to him, and he then turn round and kill his assailant in order to avoid destruction: this homicide is excusable, as being committed in self-defence; *Fost.* 277; and, malice apart, it is little matter, in such a case, which struck the first blow at the beginning of the contest. *Id.*; 1 *Hale*, 482: *but see* 1 *Hawk. c.* 29, *s.* 17. And the same, of course, where one man attacks another, and the latter, without fighting, flies, and then turns round and kills his assailant, as above mentioned. But in either of these cases, to shew that it was homicide *se defendendo*, it must appear that the party killing had retreated either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him; 1 *Hale*, 481, 483; for the assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, if there be no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape, although he would; in manslaughter he would not escape if he could.

And, as the manner of the defence, so is also the time, to be considered; for if the person assaulted do not fall upon the aggressor until the affray is over, or when he is running away, that is revenge, and not defence. 4 *Bl. Com.* 185. Neither, under the cover of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if A. and B. agree to fight a duel, and A. give the first onset, and B. retreat as far as he safely can, and then kill A., this is murder, because of the previous malice and concerted design. 1 *Hale*, 479.

Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation

assisting being construed the same as the act of the party himself. 1 *Hale*, 484; 4 *Bl. Com.* 182.

There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: as, for instance, the case mentioned by Lord Bacon, (*Elem. c.* 5; *see also* 1 *Hawk. c.* 28, *s.* 26), where two persons, being shipwrecked, have got on the same plank, but, finding it not able to save them both, one of them thrusts the other from it, and he is drowned: this homicide is excusable through unavoidable necessity, and upon the principle of self-defence.

4. If, when two persons are fighting, a third come up, and take the part of one of them, and kill the other; this will be manslaughter in the third party; 1 *Hawk. c.* 31, *ss.* 35, 56; and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel. *Id. s.* 55. If the fighting, however, were deliberate, or otherwise of malice, and the third party, when he interfered, knew it to be so, the killing would be murder, both in the party who thus interfered, and in the person whom he assisted. 1 *East, P. C.* 291, 292. If, on the other hand, the third party, who thus interferes, be killed, it is but manslaughter. *Id.: and see* 12 *Co.* 87: *Kel.* 59.

*Killing upon Provocation.*]—No provocation whatever can render homicide justifiable, or even excusable; the least it can amount to is manslaughter. If a man kill another suddenly, without any, or without a considerable provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as must have greatly provoked him, the killing is manslaughter only. *Kel.* 135; 1 *Hale*, 466; *Fost.* 290. In considering, however, whether the killing upon provocation amount to murder or manslaughter, the instrument wherewith the homicide was effected must also be taken into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, the mode of resentment must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter. Where, some provoking words being used by a soldier to a woman, she gave him a box on the ear, and the soldier immediately gave her a blow with the pommel of his sword on the breast, and then ran after her, and stabbed her in the back; this was at first deemed murder; but it appearing afterwards that the blow given to the soldier was with an iron patten, and that it drew a great deal of blood, the offence was holden to be manslaughter only. *R.* v. *Steadman*, *Fost.* 292. Where two soldiers demanded to be admitted to a public-house to drink, and the landlord refused, because it was eleven o'clock at night; one of them, however, upon the door being afterwards opened to let out company, rushed in, and whilst the landlord was struggling to get him out, the other soldier struck the landlord on the head with a sharp instrument and killed him: this was holden to be murder, notwithstanding the struggle with the other soldier; besides the landlord had a right to put him out of his house. *R.* v. *Willoughby*, 1 *East, P. C.* 288; 1 *Russ.* 517. So, where a park-keeper, having

found a boy stealing wood, tied him to a horse's tail, and dragged him along the park, and the boy died of the injuries he thereby received: this was holden to be murder. 1 *Hale*, 454. So, in all other cases, where, upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, it is murder. 4 *Bl. Com.* 199; *and see R.* v. *Tranter*, 1 *Str.* 499; *Fost.* 292. An unwarrantable imprisonment of a man's person, however, has been holden sufficient provocation to make a killing, even with a sword, manslaughter only. *R.* v. *Buckner*, *Sty.* 467: *R.* v. *Withers*, 1 *East*, *P. C.* 233. Therefore, where a constable took a man without warrant, upon a charge which gave him no authority to do so, and the prisoner ran away, and J. S., who was with the constable all the time, ran after the prisoner, who, to prevent his being retaken, killed J. S.; it was holden to be manslaughter only, although, whilst under the charge of the constable, the prisoner struck the man who gave the charge; because a blow under the provocation of the illegal arrest would not justify the constable in detaining him, unless the blow were likely to be followed by dangerous consequences, and formed a new and distinct ground of detainer. *R.* v. *Curran*, 1 *Mood. C. C.* 132; *see R.* v. *Thompson*, *Id.* 80, *post*, *p.* 424. Where A., to prevent B. from fighting with his brother, laid hold of him and held him down, but struck no blow, upon which B. stabbed A.; it was holden, that if A. did nothing more than was necessary to prevent B. from beating his brother, and had died of the stab, the offence of B. would have been murder; but that if A. did more than was necessary to prevent the beating of his brother, it would have been manslaughter only. *R.* v. *Browne*, 5 *C. & P.* 120. If a man pull another's nose, or offer him any other great personal indignity, and the other thereupon immediately kill him, it is manslaughter only. *Kel.* 135; 4 *Bl. Com.* 191. Or if a man take another in adultery with his wife, and kill him directly upon the spot, this is manslaughter merely. 1 *Hale*, 486; *R.* v. *Manning*, *T. Raym.* 212; 1 *Ventr.* 159. So, if a father see another person in the act of committing an unnatural crime with his son, and instantly kill him, it is manslaughter only; but, if hearing of it, he go in quest of the party, and kill him, it is murder. *Reg.* v. *Fisher*, 8 *C. & P.* 182. Where a boy, after fighting with another, ran home bleeding to his father; and the father immediately took a small cudgel, and ran three quarters of a mile to the place where the other boy was, and struck him a single blow of the stick, of which blow the boy afterwards died; this was holden to be manslaughter only. *R.* v. *Rowley*, 12 *Co.* 87; *and see Fost.* 294. Where a mob threw a pickpocket into a pond, for the purpose of ducking him, but he was unfortunately drowned: this was holden to be manslaughter. *R.* v. *Fray*, 1 *East*, *P. C.* 236. But it may safely be laid down as a general rule, that no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce homicide to manslaughter, if the killing be effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm be otherwise manifested; but if effected with a blow of a fist, or with a stick, or other weapon not likely to kill, it is manslaughter only. *Fost.* 290, 291; 1 *Hale*, 455. And if there be a provocation by blows, which are not sufficiently violent in themselves to reduce the killing below the crime of murder, yet if they be accompanied by very aggravated words and

gestures, this may make it manslaughter only. *Reg.* v. *Sherwood*, 1 *C. & K.* 556.

But in all cases, to reduce a homicide upon provocation to manslaughter, it is essential that the battery or wounding, &c., appear to have been inflicted immediately upon the provocation being given; for if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. *Fost.* 296. *See R.* v. *Thomas*, 7 *C. & P.* 817. The prisoner and the deceased, who were previously on intimate terms, were at a public-house drinking, when a scuffle ensued, and the deceased struck the prisoner in the eye and gave him a black eye; the prisoner called for the police, and went away upon the policeman coming up; in about five minutes, however, he returned and stabbed the deceased with a knife which he usually carried about him: Lord *Tenterden*, C. J., said that it was not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offence from murder to manslaughter; and that, if there had been any evidence of an old grudge between the parties, the crime would probably be murder: but he left it to the jury to say, whether in the interval during which the prisoner was absent, there was time for his passion to cool and reason to gain dominion over his mind; if not they should find him guilty of manslaughter only. *R.* v. *Lynch*, 5 *C. & P.* 324. Again, where the prisoner was at the house of the deceased's mother, who desired the deceased to turn the prisoner out, and he did so, giving him a kick at the time, upon which the prisoner said he would make him remember it, and went home, about 300 yards, passed through his bed-room to a kitchen adjoining, and into the pantry, where he kept a knife, and having got it, returned hastily and met the deceased coming towards him with his hat, when a conversation ensued, and they walked together, when the deceased giving the prisoner his hat, the prisoner swore he would have his rights, and stabbed the deceased in two places, saying, he had served him right; after this the prisoner ran home, repassed through the rooms to the pantry, and then went to bed, where he was shortly afterwards apprehended, and the knife found on the shelf in the pantry:—*Tindal*, C. J., told the jury, that the principal question was, whether the wounds were given by the prisoner whilst smarting under a provocation so recent, as shewing that he might be considered at the moment not master of his understanding, in which case it would be manslaughter only; or whether, after the provocation, there had been time for the blood to cool, and reason to resume its sway, before the wound was inflicted, in which case the offence would be murder: the jury found the prisoner guilty of murder. *R.* v. *Hayward*, 6 *C. & P.* 157. If there be evidence of express malice, the killing will be murder, however great the provocation. *R.* v. *Mason*, *Fost.* 132; *and see Fost.* 296; *R.* v. *Kirkham*, 3 *C. & P.* 115.

*Killing by Correction.*]—Where a parent is moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal, and he happens to occasion his death, it is only misadventure; but if he exceed the bounds of moderation, either in the man-

ner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at the least, and in some cases (according to the circumstances) murder. 1 *Hale*, 473, 474. Where a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died; these were, justly holden to be murders; because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of killing. *Id.*; *Fost.* 262. So, in all other cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. *Fost.* 262. A mother being angry with one of her children, took up a poker, and on his running to the door of the room which was open, threw it after him and killed another child who was entering the room at the time; and it was holden to be manslaughter, although she did not intend to hit the child she threw the poker at, but merely to frighten him; because it was an improper mode of correction. *R.* v. *Connor*, 7 *C.* & *P.* 438. Where a master struck his servant with one of his clogs, because he had not cleaned them, and death unfortunately ensued; it was holden to be manslaughter only, because the clog was very unlikely to cause death, and the master consequently could not have the intention of taking away the servant's life by hitting him with it. *R.* v. *Turner*, *Comb.* 407, 408; *and see R.* v. *Wigg*, 1 *Leach*, 378, *n.*: *Anon.*, 1 *East*, *P. C.* 261: *R.* v. *Leggit*, 8 *C.* & *P.* 191.

*Killing in defence of Property*, &c.]—If any person attempt to rob, or murder another in or near the highway, or in a dwelling-house, or attempt burglariously to break any dwelling-house, in the night-time, and be killed in the attempt, the slayer shall be acquitted and discharged; for the homicide is justifiable, and the killing is without felony. *See* 9 *G.* 4, *c.* 31, *s.* 10, (*post*, *p.* 441); *and see* 1 *Hale*, 481, &c. And the same, where a man is killed in attempting to burn a house, 1 *Hale*, 488, or where a woman kills a man who attempts to ravish her; *Bac. Elem.* 34: 1 *Hawk. c.* 28, *s.* 22; or where a man is killed in attempting to break open a house in the day-time with intent to rob, 1 *Hale*, 488, or to commit any other forcible and atrocious crime. *Bract.* 155; *Fost.* 273; *Kel.* 129; 1 *Hale*, 484. *See R.* v. *Levett*, *Cro. Car.* 538; *Fost.* 299: *R.* v. *Ford*, *Kel.* 51. And not only the party whose person or property is thus attacked, but his servants or other members of his family, and even strangers who are present at the time, are equally justified in killing the assailant. 1 *Hale*, 481, 484; *Fost.* 274. The above rule, however, does not extend to felonies without force, such as picking pockets, 1 *Hale*, 488, nor to misdemeanors of any kind: and even in cases within the rule, it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, 1 *Hale*, 484, otherwise the homicide will be manslaughter at least, if not murder. Where a servant set to watch in his master's garden at night, shot a person whom he saw going into his master's hen-roost; it was holden that he was not justified in so doing, unless he had fair ground to believe his own life to be in actual danger. *R.* v. *Scully*, 1 *C.* & *P.* 319. In cases within the rule, it may be necessary to observe, that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but may even

pursue the assailant until he find himself or his property out of danger. *Fost.* 273.

What we have now said relates to felonies by force. In the case of forcible misdemeanors, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet if he kill him, it will be manslaughter; 1 *Hale*, 485, 486; or if instead of beating him, he attack him with a deadly weapon, it would perhaps be murder, particularly if the wound were given after the party had desisted from the trespass. *Id.* 473. *See R.* v. *Smith*, 1 *Russ.* 546. But in defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence, a man who attack him personally; with this distinction, however, that in defending his house he need not retreat, as in other cases of *se defendendo*, for that would be giving up his house to his adversary. 1 *Hale*, 485, 486. As to personal assaults, where the party assaulted kills his adversary, we have already considered them under the foregoing heads.

*Killing without Intention, whilst doing another Act.*]—If a person, whilst doing or attempting to do another act, undesignedly kill a man—if the act intended or attempted were a felony, the killing is murder; if unlawful, (*malum in se*), but not amounting to felony, the killing is manslaughter: if lawful, (that is, not being *malum in se*), homicide by misadventure merely. If a man deliberately shoot at A., and miss him, but kill B., this is murder. *Fost.* 261; 1 *Hale*, 441, 438. So, if he strike at A., and by accident strike and kill B., it is murder. *R.* v. *Hunt*, 1 *Mood. C. C.* 93. If a man lay poison for A., and B. (against whom he had no malicious intent) take it, and it kill him, this is likewise murder. 1 *Hale*, 436; *R.* v. *Sanders*, *Plowd.* 474: *R.* v. *Gore*, 9 *Co.* 81. So if whilst two men are deliberately fighting, a third go between them to part them, and be killed by one of them, it is murder, 1 *Hale*, 441, whether he were killed accidentally or designedly. If a man shoot at another's poultry, with intent to steal them, and by accident kill a man, it is murder: if without such intent, it is manslaughter; the act of shooting at the poultry being unlawful, but not felonious. *Fost.* 258. If a man throw a stone at a horse, and it hit the rider and kill him, it is manslaughter. 1 *Hale*, 39. If, when engaged in an unlawful or dangerous sport, a man kill another by accident, it is manslaughter; *Fost.* 259, 260, 261; 1 *Hale*, 472, 473; 1 *Hawk. c.* 29; *s.* 5; if the sport were lawful and not dangerous, it would be homicide by misadventure merely. *Fost.* 260. So, if a man intending to kill a person attempting to commit a forcible and atrocious crime against his person or property, (*see ante*, *p.* 409), by mistake kill one of his own family, it is homicide by misadventure merely. *See Cro. Car.* 538; *Fost.* 299. Where a man is at work with a hatchet, and the head of it flies off and kills a bystander, this is homicide, by misadventure. 1 *Hawk. c.* 29, *s.* 2. So, if a man, shooting at game, by accident kill another, it is homicide by misadventure merely, even although the party be unqualified; *Fost.* 259; for the use of fire-arms by an unqualified person is merely a prohibited act, and not *malum in se*.

There are two seeming exceptions, however, to the above rule.

*First*, if two persons be fighting under such circumstances, that if one were killed it would be manslaughter only in the other; if in such a case an innocent party be unintentionally killed by one of them, it is manslaughter only. *Fost.* 262: *R.* v. *Brown*, 1 *Leach*, 148. This, perhaps, is not strictly an exception; for the act in which the parties are engaged, namely, the fighting, is not in itself felonious, although the result of it may be so.

*Secondly*. Where an act, in itself lawful, is at the same time dangerous—in order to render an unintentional homicide from it excusable, it must appear that the party, whilst doing the act, used such a degree of caution as to make it improbable that any danger or injury should arise from it to others: if not, the homicide will be manslaughter at the least. For instance, if a workman throw stones or rubbish, &c., from a house, and thereby kill a person passing underneath, it is murder, manslaughter, or homicide by misadventure; according to the degree of precaution taken by him that no person should be injured by them, and of the necessity of such precaution. If he did it without previously warning the persons beneath, and at a time when it was likely that persons were passing, it would be murder; 3 *Inst.* 57; if at a time when it was not likely that any persons were passing, it would be manslaughter; *Fost.* 262; if in a retired place, where no persons were in the habit of passing, or likely to pass, it would be misadventure merely. *Fost.* 262; 1 *Hale*, 472, 475. But if he previously gave warning to the persons beneath—then, if it happened in a country village, where few persons pass, it is misadventure only; *Fost.* 262; 1 *Hale*, 472, 475; if in London, or other populous towns, *Kel.* 40, at a time when the streets are full, *Fost.* 268, it would be manslaughter.

If a man, breaking an unruly or vicious horse, ride him amongst a crowd, and the horse kick a man and kill him; this is murder, if the rider brought the horse into the crowd with intent to do mischief, or even to divert himself by frightening the crowd; 1 *Hawk. c.* 31, *s.* 68; manslaughter if done heedlessly and incautiously only. 1 *East*, *P. C.* 231: *see* 1 *Hale*, 475; 1 *Hawk. c.* 29, *s.* 12.

If a man, driving a cart or other carriage, drive it over another man and kill him—if he saw or had timely notice of the probable mischief, and yet drove on, it would be murder; 1 *Hale*, 475; *Fost.* 263; if he purposely drove it furiously in amongst a crowd, it would probably be murder; *semb.* if in a street where persons were much in the habit of passing, it would be manslaughter; *per Holt*, C. J., 1 *East*, *P. C.* 263; if in a place where people did not usually pass, misadventure merely, provided he took that care which persons in similar situations are accustomed to do. *Anon.*, 1 *East*, *P. C.* 261. Upon an indictment for manslaughter, it appeared that the deceased was walking in the road drunk, when the prisoner, who was in a cart driving two horses without reins, and going at a furious pace, run over him and killed him: the prisoner had called out twice to the deceased, who from the state in which he was, and the pace of the horses, could not get out of the road: *Garrow*, B., held this to be manslaughter. *R.* v. *Walker*, 1 *C. & P.* 320. Two persons were riding furiously on horseback along the road; one passed the deceased, who was also on horseback, but the other rode against him, and both fell, the deceased being killed by the concussion: *Patteson*,

J., directed an acquittal of the first who passed; and as to the second, told the jury to find him guilty of manslaughter, if they thought that by furious riding, he ran against the deceased; but to acquit him if they thought that the deceased's horse was unruly and ran against the horse of the prisoner. *R.* v. *Mastin*, 6 *C. & P.* 396. A foot passenger was walking along the road by lamp-light, when the defendant, who was near-sighted, drove along at the rate of eight or nine miles an hour, sitting at the time at the bottom of his cart, and ran over the foot passenger and killed him; and it was holden to be manslaughter. *R.* v. *Grout*, 6 *C. & P.* 629. If the driver of a carriage race with another carriage, and urge his horses to so rapid a pace that he cannot control them, it is manslaughter, if, in consequence, the carriage upset and a passenger be killed. *R.* v. *Timmins*, 7 *C. & P.* 499. To make the captain of a vessel liable for manslaughter in causing a person to be drowned by running down the boat, it must be shewn that the captain did some act which conduced to the death; a mere omission to do his duty is not sufficient. *R.* v. *Green*, 7 *C. & P.* 156; *R.* v. *Allen*, *Id.* 153.

Where a man lays poison to kill rats, and another man takes it, and it kills him; if the poison were laid in such a manner or place as to be mistaken for food, it is, perhaps, manslaughter; 1 *Hale*, 431; if otherwise, misadventure only. *Id.*

If a man discharge a loaded gun amongst a multitude of people, and death ensue, it is murder; for the law in such a case will imply malice. 1 *Hale*, 475. If he discharge it merely for the purpose of unloading it, or the like, and death ensue—then, if it were in a place where persons were likely to pass, it is manslaughter; *R.* v. *Burton*, 1 *Str.* 481; otherwise misadventure only. As to death occasioned by spring guns, *see Ilott* v. *Wilkes*, 3 *B. & Ald.* 304; 7 & 8 *G.* 4, *c.* 18. Where a man gave a loaded gun to his servant to protect a corn-field from deer during the night, with instructions to fire when he heard any bustle in the corn by the deer; and the master himself unfortunately rushed into the corn during the night, and the servant, imagining it to be the deer, fired, and shot his master; this was holden to be misadventure. 1 *Hale*, 476; 1 *East*, *P. C.* 266. Where a man, finding a pistol in the street, brought it home, and imagining (from having tried it with a rammer) that it was not loaded, presented it in sport at his wife, drew the trigger, and killed her; this was holden to be manslaughter; *R.* v. *Rampton*, *Kel.* 41; but Mr. Justice *Foster* doubts the propriety of the decision, as the defendant took the usual precaution to ascertain that the pistol was not loaded; *see Fost.* 264, 265; and clearly, if he took not this or other reasonable precaution, it would be manslaughter. If a man shooting at butts or a target, by accident kill a bystander, it is misadventure; 1 *Hale*, 472, 475, 38; but this must be understood of cases where a proper precaution to prevent accidents has been taken; for if the target, &c., be placed near a highway or path, where persons are in the habit of passing, the killing would probably be deemed manslaughter. A cannon returned to an ironfounder burst, was sent back by him in so imperfect a state, that on being fired it burst again and killed a person, and it was held to be manslaughter. *R.* v. *Carr*, 8 *C. & P.* 163.

So, if a man, knowing that people are passing along a street, wantonly throw a stone or shoot an arrow into it, likely to do an injury,

with an intent to hurt some of the persons passing, and a person be killed by it, it is murder, although the stone or arrow was not intended to hit any particular person; 1 *Hale*, 475; 3 *Inst.* 57; but if it were done thoughtlessly and incautiously, and without intent to hurt any one—then, if it were thrown or shot into a place where people were in the habit of passing, the killing is manslaughter; 1 *Hale*, 475; 1 *Hawk*, *c.* 29, *s.* 9; if into a place where persons were non likely to pass, misadventure only. A lad out of frolic took the trap-stick out of the front part of a cart, in consequence of which it upset and the carman, who was loading sacks therein, was killed; and this was held to be manslaughter. *R.* v. *Sullivan*, 7 *C.* & *P.* 641. If an improper quantity of spirituous liquors be given to a child of tender years, heedlessly and for brutal sport, if death ensue, it will be manslaughter. *R.* v. *Martin*, 3 *C.* & *P.* 211.

*Killing Officers of Justice and Others.*]—If a man kill an officer of justice, either civil or criminal, such as a bailiff, constable, watchman, &c., in the legal execution of his duty, or any person acting in aid of him (whether specially called thereunto or not, 1 *Hale*, 462), or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes; the law will imply malice, and the offender will be guilty of murder. 1 *Hale*, 456, 457, 460; *Fost.* 270, 308, *et seq.* And the officer and persons acting in aid of him enjoy this privilege and protection, *eundo, morando, et redeundo*; therefore, if an officer, on his way to do his duty, be opposed and killed, it is murder; or if he arrive at the place, and in consequence of opposition retreat, and on his retreat be killed, it is murder. *Fost.* 308, 309; 9 *Co.* 67 *b*; 1 *Hale*, 462; *Reg.* v. *Phelps*, *C.* & *Mar.* 180. Three things are to be attended to in matters of this kind; the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or against a wrong person, or out of the district in which alone it could legally be executed; or if a private person interfere and act in a case where he has no authority by law to do so; or if the defendant had no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person be resisted and killed; the killing will be manslaughter only.

1. As to the legality of the authority:—If an officer having a warrant from a proper magistrate to apprehend B. for felony; or if B. be indicted for felony; or if the hue and cry be levied against B.; in these cases, if B. or any of his accomplices kill the officer or any person joining in the hue and cry, it is murder, whether B. be guilty or innocent of the felony charged against him. *Fost.* 318. But if the warrant were illegal and void upon the face of it, *see* 1 *Hale*, 459; 1 *East*, *P. C.* 310, or issued with a blank in it, and the blank afterwards filled up; *R.* v. *Stockley*, 1 *East*, *P. C.* 310; *and see Housin* v. *Barrow*, 6 *T. R.* 122: *R.* v. *Winwick*, 8 *Id.* 454: *R.* v. *Hood*, 1 *Mood. C. C.* 281; or issued with an insufficient description of the defendant, as for instance, if it were to take the son of J. S. L., *Id.*, or if it be attempted to be executed against C. instead of B., the killing would be manslaughter only. If a writ of execution in civil cases be correct upon the face of it, although the judgment be

erroneous, or the proceedings irregular, if the officer, in endeavouring to execute it, be resisted and killed, it is murder; 1 *Hale*, 457; *Fost.* 411, 412; but if the writ were a nullity on the face of it, or if the warrant upon it, were attempted to be executed by any other than the officer to whom it was directed, (the officer himself not being present, or at least, acting in the arrest, *see Cowp.* 65), the killing would be manslaughter only. If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him: if the party attempting the arrest were a constable, the killing is murder; 1 *Hawk. c.* 28, *s.* 121; 2 *Hale*, 84, 87, 91; if a private person, manslaughter; *see* 2 *Hale*, 83, 92; because the constable has authority by law to arrest in such a case, but a private person has not. And the same in all cases where a person is arrested or attempting to be arrested upon a reasonable suspicion of felony. *See Samuel* v. *Payne, Doug.* 359. Upon an indictment for shooting at and cutting a constable with intent, &c., it appeared that the defendant has been given in charge to the constable for having a forged note in his possession, and upon the constable attempting to handcuff him, had fired a pistol at the constable and wounded him, and afterwards cut him with the cock of the pistol: it was argued that the charge imported no legal offence, for if he did not know the note to be forged the defendant was no felon, and the arrest was illegal; but it was holden that the defect in the charge was immaterial, and that it was not necessary for the charge to contain the same accurate description of the offence as an indictment, and that the charge must have been considered as importing a guilty knowledge. *R.* v. *Ford, R. & R.* 329. But where the defendant took his tools and left his work, saying that "he would do for any bloody constable that offered to stop him," and his master applied to a constable to take the defendant, but made no charge against the defendant, and the master and the constable followed the defendant, and found him in a public privy as if he had occasion there, and the master said, "This is the man, I give you charge of him;" upon which the constable said, "Your master gives you in charge of me, you must go with me;" and the defendant immediately stabbed the constable; it was holden, by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to make the arrest, was such a provocation as reduced the offence to manslaughter only. *R.* v. *Thompson*, 1 *Mood. C. C.* 80. If a constable take a man without warrant, upon a charge which gives him no authority to do so, and the prisoner run away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S., it is manslaughter only, because the arrest was illegal, and J. S. ought to have known it; and therefore the attempt to take the prisoner was illegal also. *R.* v. *Curvan*, 1 *Mood. C. C.* 132. A constable, without warrant, apprehended N. on suspicion of having recently stolen potatoes out of the ground, and called O. to assist him; a rescue was attempted, in the course of which one of the party killed O.; and this was held to be manslaughter only; for, without warrant, the constable could only arrest a person found committing such offence, under the stat. 7 & 8 *G.* 4, *c.* 29, *s.* 63. *Reg* v. *Phelps*, (*ante*, *p.* 423). But if a constable, having a charge

of felony against a defendant, take him without a warrant, and the defendant, knowing the constable, kill him, it will be murder, even though the constable do not tell him of the charge, and the defendant in fact has done nothing for which he is liable to be arrested. *R.* v. *Woolmer*, 1 *Mood. C. C.* 334. So, if a man actually commit a felony, and another, in whose presence he committed it, attempt to arrest him for it, and be resisted and killed; 2 *Hawk. c.* 12, *s.* 1; or if a person present at an affray, interfere for the purpose of restraining the offenders and keeping the peace, and be killed; 3 *Inst.* 52; 1 *Hawk. c.* 31, *ss.* 48, 54; *Fost.* 310, 311; or, if a person present when another attempts to commit a treason or felony, lay hold of him in order to prevent him, and be killed; 2 *Hawk. c.* 12, *s.* 19; the killing in these cases would be murder, whether the person arresting or interfering, &c., be a constable or not; for either has power to arrest or interfere, &c., in such a case. *R.* v. *Hunt*, 1 *Mood. C. C.* 93: *R.* v. *Curran*, 3 *C. & P.* 397: *R.* v. *Price*, 8 *C. & P.* 282; *R.* v. *Weir*, 1 *P. & C.* 261. So, where a man seen attempting to commit a felony, on fresh pursuit kills his pursuer, it is as much murder as if the party were killed while attempting to take the defendant in the act. *R.* v. *Howarth*, 1 *Mood. C. C.* 207; *see Beckwith* v. *Philby*, 6 *B. & C.* 638. So, if a person be taken before a magistrate for an assault, and whilst the warrant is being made up for his commitment, escape, a constable may by verbal directions from the magistrate pursue and apprehend him, and if in so doing the constable is killed, it is murder. *R.* v. *Williams*, 1 *Mood. C. C.* 387. If a seaman be impressed, and the pressgang be resisted, and any of them be killed; if the pressgang at the time were under the direction of a commissioned officer, and such officer were then acting with them, the killing would be murder, otherwise but manslaughter; *R.* v. *Broadfoot*, *Fost.* 154: for the presence of a commissioned officer is necessary to the due execution of an impress warrant. Where two soldiers not belonging to a recruiting party, who were in a public-house, wished to enlist M., and gave him a shilling for that purpose, and M. afterwards wishing to go away, an altercation ensued, and one of the soldiers stood at the door with his drawn sword, and swore he would stab any person who attempted to come in, and the landlord of the house was stabbed in the scuffle: it was argued that the soldiers had authority to enlist M., and that what was done was merely to prevent his rescue; but the judges held, that they had no authority, and that the offence amounted to murder. *R.* v. *Longden*, *R. & R.* 228. A constable who had verbal orders from the magistrates to apprehend all thimble-riggers, attempted to apprehend the defendant and his companions, who were playing at thimble-rig in a public fair; he succeeded in apprehending one of his companions, whom the defendant rescued, and afterwards, in the evening, seeing the defendant in a public-house, endeavoured to apprehend him, telling him that he did so for what he had been doing in the fair; the defendant escaped into a privy, and the constable, calling others to his assistance, broke open the privy and attempted to apprehend the prisoner, who stabbed one of the party, and it was holden that the constable had authority to apprehend the defendant. *R.* v. *Gardener*, 1 *Mood. C. C.* 390.

A special constable duly appointed under the stat. 1 & 2 *W.* 4, *c.* 41, is appointed for an indefinite time, and retains all the authority of a constable at common law, until his services are suspended

or determined under the 9th section of that statute. *Reg.* v. *Porter*, 9 *C. & P.* 778.

By stat. 9 *G.* 4, *c.* 69, gamekeepers are empowered to apprehend poachers; and though *s.* 2 only authorizes the apprehension for the offences mentioned in *s.* 1, yet they may apprehend the offenders where three or more are out by night armed, &c., for although that offence is punishable by *s.* 9, it is still an offence under *s.* 1. *R.* v. *Ball*, 1 *Mood. C. C.* 330. To authorize an apprehension under this statute, it is not necessary that the gamekeeper should give notice of his purpose; *R. v. Payne*, 1 *Mood. C. C.* 378; nor that he should have a written authority from his master for so doing, provided the poacher be on his master's land or manor; *R.* v. *Price*, 7 *C. & P.* 178; but he may not, without authority, apprehend him upon the land or manor of another person. *R.* v. *Davis*, 7 *C. & P.* 785. And if a keeper attempting lawfully to apprehend a poacher be met with violence, and in opposition to such violence and in self-defence strike the poacher, and then be killed by the poacher it will be murder. *R.* v. *Ball*, 1 *Mood. C. C.* 333. Even an interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. *R.* v. *Warner*, 1 *Mood. C. C.* 380.

2. As to the legality of the manner in which the authority is exercised:—If the constable of the vill of A. attempt without warrant to suppress a tumult in the vill of B., and be resisted and killed, it is manslaughter only; for he had authority in such a case within the vill of A alone. 1 *Hale*, 459. So, if a sheriff's officer attempt to execute a writ out of the proper county, and be resisted and killed, it is manslaughter only. 1 *Hale*, 457 *et seq.* But by stat. 5 *G.* 4, *c.* 18, *s.* 16, constables and other peace officers may execute warrants out of their respective precincts, provided the place where the warrant is executed be within the jurisdiction of the magistrate granting or backing the warrant. If an officer, were to attempt the arrest of a man on a Sunday, (unless for treason, felony, or breach of the peace, *see* 29 *C.* 2, *c.* 7, *s.* 6), and were resisted and killed, it would be manslaughter only. A constable who had a warrant to apprehend A., gave it to his son, who, in attempting to apprehend A , was stabbed with a knife which he happened to have in his hand, the constable being in sight, but a quarter of a mile off; and it was held, that the son had no authority to apprehend A. *R.* v. *Patience*, 7 *C. & P.* 775.

3. As to the defendant's knowledge of the deceased's authority or intention:—When any officer is in the legal execution of his duty, or a private person endeavouring to suppress an affray, or apprehend a felon, and is resisted and killed; if it appear that the slayer knew the officer's business or the intent of the private person, either expressly from the deceased, or impliedly from circumstances, *R.* v. *Howarth*, 1 *Mood. C. C* 207, the killing is murder; if it appear that he was ignorant in this respect, it is manslaughter only. 1 *Hawk.* c. 31, *ss.* 49, 50; *Fost.* 310; 1 *Hale*, 458, *&c.* Where a bailiff rushed into a gentleman's bedchamber early in the morning, without giving the slightest intimation of his business, and the gentleman, not knowing him, in the impulse of the moment wounded

him with his sword and killed him: this was holden to be manslaughter. 1 *Hale*, 470. But where the bailiff or constable shews the warrant; 1 *Hale*, 461; or where it appears that he is known to the defendant to be an officer; as for instance, when the defendant said, "Stand off, I know you well enough, come at your peril," *R.* v. *Pew, Cro. Car.* 183, if after this the officer be killed, it will be murder. If the constable interfere to prevent any affray within his own vill, if he be killed by one of the inhabitants, or other person, who knows him to be the constable, it will be murder; if by a stranger who does not know him, it is manslaughter. So, if one of several know him to be a constable, it will be murder in him, manslaughter in the rest. 1 *Hale*, 438. If a constable command the peace, 1 *Hale*, 461, or shew his staff of office, *Fost.* 311, this, it seems, is a sufficient intimation of his authority. And in such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable is sufficient. 1 *East, P. C.* 315. But private persons, when they interfere, must expressly intimate their intention, otherwise killing them will be manslaughter only. *Fost.* 310, 311. Where the outer door of a dwelling-house may be broken open, in order to execute process, (as, for instance, in the case of a *capias* upon an indictment, 2 *Hawk. c.* 14, *s.* 3, a warrant to search for stolen goods, 2 *Hale*, 151, a *capias utlagatum*, 2 *Hawk. c.* 14, *s.* 6, a warrant of a magistrate for levying a penalty, *Id. s.* 5, a magistrate's warrant to arrest for any specific crime, *Fost.* 320; 2 *Hawk. c.* 14, *s.* 3; 1 *Hale*, 584; or where a person lawfully arrested escapes into a house; 2 *Hawk. c.* 14, *s.* 9; where one known to have committed treason or felony, or to have dangerously wounded another, escapes into a house; *Id. s.* 7; where an affray is made in a house, and the constable wants to suppress it, or take the offender; *Id. s.* 6; where there is disorderly drinking or noise in a house at any unseasonable time of night, particularly in inns, taverns, or alehouses, and the constable or his watch wish to suppress the disorder; 2 *Hale*, 65; and in the case of forcible entry or detainer; 2 *Hawk. c.* 14, *s.* 6; but not in the execution of writs in civil cases, *Fost.* 319, excepting writs of seisin, or *habere facias possessionem*, 5 *Co.* 91): in all these cases, before the outer door is broken open, there must be a demand of admittance, or something equivalent thereto, and a refusal; *Fost.* 320, 136: *see Launock* v. *Brown*, 2 *B. & Ald.* 592; otherwise, if the officer be killed, it will be manslaughter only.

In all cases, however, above stated to be manslaughter only, if there be evidence of express malice in the party killing, the homicide will be murder. *See R.* v. *Stockley*, 1 *East, P. C.* 310: *R.* v. *Curtis, Fost.* 135.

*Killing by officers and Others.*]—Where an officer of justice, in endeavouring to execute his duty, kills a man, this is justifiable homicide, or manslaughter, or murder, according to circumstances.

1. Where an officer of justice is resisted in the legal execution of his duty, (*see ante, p.* 423), he may repel force by force; and if, in doing so, he kill the party resisting him, it is justifiable homicide; and this in civil as well as in criminal cases. 1 *Hale*, 494; 2 *Hale*, 118. And the same as to persons acting in aid of such officer. Thus, if a peace officer have a legal warrant against B. for felony,

or if B. stand indicted for felony, or if hue and cry be levied against B.; in these cases, if B. resist, and, in the struggle, be killed by the officer, or any person acting in aid of him, or joining in the hue and cry, the killing is justifiable. *Fost.* 318. So, if a private person attempt to arrest one who commits a felony in his presence, or interfere to suppress an affray, and be resisted, and kill the person resisting, this is also justifiable homicide. 1 *Hale*, 481, 484; *Fost.* 274. And this, not merely on the principle of self-defence, for the officer or private person is not bound to retreat, as in the case of homicide *se defendendo*, 2 *Hale*, 218, but upon that principle, and the necessity of executing the duty the law has imposed upon him, jointly. Still, there must be an apparent necessity for the killing; for if the officer were to kill after the resistance had ceased, 1 *East, P. C.* 297, or if there were no reasonable necessity for the violence used upon the part of the officer, &c., *see R.* v. *Goffe*, 1 *Vent.* 216, the killing would be manslaughter at the least. Also, in order to justify an officer or private person in these cases, it is necessary that they should, at the time, be in the act of legally executing a duty imposed upon them by law, and under such circumstances, that if the officer or private person were killed, it would have been murder; (*see ante, p.* 432); for if the circumstances of the case were such, that it would have been manslaughter only to kill the officer or private person, it will be manslaughter at least in the officer or private person to kill the party resisting. *See Fost.* 318; 1 *Hale*, 490.

2. If the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he, in his defence, kill any of them, it is justifiable for the sake of preventing an escape. 1 *Hale*, 496.

3. Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is killed by the officer or private person in the pursuit: if the offence with which the man was charged were a treason or felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable; 1 *Hale*, 481; 2 *Hale*, 218, 219, 79; 1 *Hawk. c.* 28, *s.* 11, 12; *Fost.* 271; but if charged with a breach of the peace, or other misdemeanor merely, *Fost.* 271; 1 *Hale*, 481; 2 *Hale*, 117, or if the arrest were intended in a civil suit, 1 *Hale*, 481; *Fost.* 271, or if a press-gang kill a seaman or other person flying from them, *R.* v. *Browning*, 1 *East, P. C.* 312; *and see Id.* 308; *Doug.* 207, the killing, in these cases, would be murder, unless, indeed, the homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other weapon not likely to kill, or the like; in which case the homicide, at most, would be manslaughter only. *See Fost.* 271. As to homicide by firing into a smuggling vessel, *see* 3 *&* 4 *W.* 4, *c.* 53, *s.* 59, *post.*

4. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law, 1 *Hale*, 495; 1 *East, P. C.* 304, and by the riot act, 1 *G.* 1, *st.* 2, *c.* 5, if the riot cannot otherwise be suppressed. 4 *Bl. Com.* 179, 180.

5. Where a criminal is executed by the proper officer, in pursuance of his sentence, this is justifiable homicide. 4 *Bl. Com.* 178. But if it be done by any other person, 1 *Hale*, 501, or not done in

strict conformity with the sentence, as, for instance, if an officer behead one who is adjudged to be hanged, or the contrary, 3 *Inst.* 52; 1 *Hale*, 501, it is murder.

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*Indictment for Murder by Shooting.*

*Commencement as ante, p.* 405]—did make an assault; and that the said J. S., a certain pistol, of the value of five shillings, then and there loaded and charged with gunpowder and one leaden bullet, (which pistol he the said J. S. in his right hand then and there had and held), to, against, and upon the said J. N. then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said J. S., with the leaden bullet aforesaid, out of the pistol aforesaid then and there by force of the gunpowder shot and sent forth as aforesaid, the said J. N., in and upon the left breast of him the said J. N., a little above the left pap of him the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, given to the said J. N. then and there, with the leaden bullet aforesaid, so as aforesaid shot, discharged, and sent forth out of the pistol aforesaid, by the said J. S, in and upon the said left breast of him the said J. N., a little above the left pap of him the said J. N., one mortal wound of the depth, &c., *as in the last precedent, ante, p.* 405.

*For the evidence necessary to support this indictment, see ante, p.* 406 *et seq.*

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*Indictment for Murder by throwing a Stone.*

*Commencement as ante, p.* 405]—did make an assault; and that the said J. S. a certain stone, of no value, which he the said J. S. in his right hand then and there had and held, to, against, and upon the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did cast and throw; and that the said J. S., with the stone aforesaid, so cast and thrown by him as aforesaid, the said J. N. in and upon the right side of the head, near the right temple of him the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did strike and wound, giving to the said J. N. then and there, with the stone aforesaid, so as aforesa d by the said J. S. cast and thrown, in and upon the said right side of the head, near the right temple of him the said J. N., one mortal wound of the length of three inches, and of the depth of one inch, &c. &c. *as in the precedent, ante, p.* 405. *The cause of the death must be stated to have arisen from the throwing the stone. A statement that the prisoners,* "with certain stones," *in and upon the deceased cast and threw, and that they, with the said stones so cast and thrown, struck the deceased, then and there giving him, by the casting and throwing of the said stones, a mortal wound, &c., was holden sufficiently to shew that the death was occasioned by stones which the prisoners threw. R.* v. *Dale,* 1 *Mood. C. C.* 5.

*For the evidence necessary to support this indictment, see ante, p.* 406 *et seq.*

*Indictment for Murder by Beating.*

*Commencement as ante, p.* 405]—did make an assault; and that the said J. S., with both his hands, the said J. N. to and against the ground, then and there feloniously, wilfully, and of his malice aforethought, did cast and throw; and that the said J. S., with both the hands and feet of him the said J. S., then and there, and whilst the said J. N. was so lying upon the ground, the said J. N. in and upon the head, stomach, back, and sides of him the said J. N., then and there feloniously, wilfully, and of his malice aforethought, did strike, beat, and kick, giving to the said J. N. then and there, as well by the casting and throwing of him the said J. N. to the ground as aforesaid, as also by the striking, beating, and kicking the said J. N. in and upon the head, stomach, back, and sides of him the said J. N., with both the hands and feet of him the said J. S., in manner aforesaid, several mortal bruises in and upon the head, stomach, back, and sides of him the said J. N.; of which said several mortal bruises, &c., *as in the precedent, ante, p.* 411, &c. *Where the indictment charged that the defendants, A. and B., in and upon C. did make an assault, and that A. with a certain stick, &c., and B. with a certain stick, &c., the said C. did strike and beat, &c., "thereby then giving him the said C." divers mortal wounds, &c., it was held bad as not sufficiently shewing to which of the defendants the word "giving" referred. Reg.* v. *Jones,* 1 *C. & P.* 243.

*For the evidence necessary to support this indictment, see ante, p.* 406 *et seq.*

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*Indictment for Murder by Riding over the Deceased.*

*Commencement as ante, p.* 405]—did make an assault; and that the said J. S., then and there riding upon a certain horse, of the price of twenty pounds, the said horse in and upon the said J. N. then and there feloniously, wilfully, and of his malice aforethought, did ride and force, and him the said J. N., with the horse aforesaid, then and there, by such riding and forcing, feloniously, wilfully, and of his malice aforethought, did cast and throw to the ground; by means whereof the said horse, with his hinder feet, him the said J. N., so cast and thrown to and upon the ground as aforesaid, in and upon the hinder part of the head of him the said J. N. then and there did strike and kick, thereby then and there giving to the said J. N., in and upon the said hinder part of the head of him the said J. N. one mortal fracture and contusion, of which said mortal fracture and contusion he the said J. N. then and there instantly died; and so the jurors, &c. &c., *as in the precedent, ante, p.* 405, *&c.*

*For the evidence necessary to support this indictment, see ante, p.* 406 *et seq.*

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*Indictment for Murder by Strangling.*

*Commencement as ante, p.* 405]—did make an assault; and that the said J. S. a certain silk handkerchief, of the value of one shilling, about the neck of him the said J. N. then and there feloniously,

wilfully, and of his malice aforethought, did fix, tie, and fasten, and that the said J. S., with the silk handkerchief aforesaid, him the said J. N. then and there feloniously, wilfully, and of his malice aforethought, did choak, suffocate, and strangle; of which said choaking, suffocation, and strangling, he the said J. N. then and there instantly died; and so, &c. &c., *as in the precedent, ante, p.* 405, *&c. The phrase "about the neck," in an indictment for murder, is good, and is not open to the same objection as "about the breast." R.* v. *Culkin,* 5 *C. & P.* 121.

*For the evidence necessary to support this indictment, see ante, p.* 406 *et seq.*

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*Indictment for Murder by Drowning.*

*Commencement as ante, p.* 405]—did make an assault; and that the said J. S. then and there feloniously, wilfully, and of his malice aforethought, did take the said J. N. into both the hands of him the said J. S. and then and there feloniously, wilfully, and of his malice aforethought, did cast, throw, and push the said J. N. into a certain pond there situate, wherein there was a great quantity of water; by means of which said casting, throwing, and pushing of the said J. N. into the pond aforesaid by the said J. S., he the said J. N., in the pond aforesaid, with the water aforesaid, was then and there choaked, suffocated, and drowned; of which said choaking, suffocation, and drowning, he the said J. N. then and there instantly died; and so, &c. &c., *as in the precedent, ante, p.* 405.

*For the evidence necessary to support this indictment, see ante, p.* 406 *et seq.: and see R.* v. *Dyson, R. & R.* 523, (*ante, p.* 412); *R.* v. *Russell,* 1 *Mood. C. C.* 356, (*ante, p.* 8).

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*Indictment for Murder by Starving.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., carpenter, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought contriving and intending one J. N. then being an apprentice to him the said J. S., feloniously to starve, kill, and murder, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, and on divers days and times between that day and the twenty-eighth day of the same month, in the same year, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said J. N., his apprentice as aforesaid, in the peace of God and of our said lady the Queen, then and there being, feloniously, wilfully, and of his malice aforethought, did make divers assaults; and that the said J. S., on the said third day of August, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. N., in a certain room in the dwelling-house of him the said J. S. there situate, feloniously, wilfully, and of his malice aforethought, did secretly confine and imprison, and that the said J. S. from the said third day of August, in the year

last aforesaid, until the twenty-eighth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, and of his malice aforethought, did neglect, omit, and refuse to give and administer, and to permit and suffer to be given and administered, to him the said J. N., sufficient meat and drink necessary for the sustenance, support, and maintenance of the body of him the said J. N.; by means of which said confinement and imprisonment, and also of such neglecting and refusing to give and administer, and to permit and suffer to be given and administered to the said J. N., such meat and drink as were sufficient and necessary for the sustenance, support, and maintenance of the body of him the said J. N., he the said J. N., from the said third day of August, in the year last aforesaid, until the twenty-eighth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, did languish, &c. &c., *as in the precedent, ante, p.* 405. *If the indictment be for refusing to supply the apprentice with necessaries, it must state that the apprentice was of tender years, unable to provide for himself. Reg.* v. *Friend, R. & R.* 20: *Reg.* v. *Marriott,* 8 *C. & P.* 425. *Where the indictment charges an imprisoning, that sufficiently shews the duty to supply food; but if it do not, then it must allege a duty in the defendant to supply the deceased with food. Reg.* v. *Edwards,* 8 *C. & P.* 611.

*The evidence is the same as that mentioned ante, p.* 406 *et seq.; but in addition to it you must prove that J. N. was the apprentice of J. S., or at least acted as such.*

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### *Indictment for Murder by Poison.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought wickedly contriving and intending one J. N., with poison, wilfully, feloniously, and of his malice aforethought to kill and murder, on the 3rd day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, and of his malice aforethought, a large quantity of a certain deadly poison called white arsenic, to wit, the quantity of two drachms of the said white arsenic, did put, mix, and mingle into and with a certain quantity of beer which the said J. N. was then and there about to drink, (the said J. S. then and there well knowing that he the said J. N. intended and was then and there about to drink the said beer, and the said J. S. then and there also well knowing the said white arsenic, so as aforesaid by him put, mixed, and mingled into and with the said beer, to be a deadly poison); and that the said J. N. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did take, drink, and swallow down a large quantity, to wit, half a pint of the said beer with which the said white arsenic was so mixed and mingled by the said J. S., as aforesaid, (he the said J. N., at the time he so took, drank, and swallowed down the said beer, not knowing there was any white arsenic, or any other poisonous or hurtful ingredient mixed or

mingled with the said beer); by means whereof he the said J. N. then and there became sick and greatly distempered in his body; and the said J. N. of the poison aforesaid, so by him taken, drunk, and swallowed down as aforesaid, and of the sickness occasioned thereby, from the said third day of August, in the year last aforesaid, until the twenty-eighth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, did languish, &c. &c., *as in the precedent, ante, p. 405. An indictment which charges only that by means of the taking and swallowing of the poison, the deceased "became mortally sick and distempered in his body," "and of the said mortal sickness died," is good, without stating that he died "of the poison aforesaid." Reg.* v. *Sandys, C. & Mar.* 345; 2 *Mood. C. C.* 227.

*For the evidence necessary to support this indictment, see ante, p.* 406 *et seq.; and see Reg.* v. *Alison,* 8 *C. & P.* 418, (*ante, p.* 412): *Reg.* v. *Leddington,* 9 *C. & P.* 79, (*ante, p.* 8).

### *Indictment against a Woman for the Murder of her Child.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that A. S., late of the parish of B., in the county of M., single woman, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, being big with a male child, did then and there bring forth of the body of her the said A. S. the said male child alive: And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S., not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said male child, the name whereof is to the jurors aforesaid unknown, in the peace of God and of our lady the Queen then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said A. S. did then and there feloniously, wilfully, and of her malice aforethought, fix, clasp, and press both the hands of her the said A. S. upon and around the neck of the said male child; and that the said A. S., with her hands so fixed, clasped, and pressed upon and around the neck of the said male child as aforesaid, him the said male child then and there feloniously, wilfully, and of her malice aforethought, did choak, suffocate, and strangle; of which said choaking, suffocation, and strangling, he the said male child then and there instantly died; and so, &c. &c., *as in the precedent, ante, p.* 405. *If the killing were by other means, the statement can readily be framed from one of the foregoing precedents. As to the naming and description of the child, see the cases, ante, p.* 31.

*By stat.* 9 *G.* 4, *c.* 31, *s.* 14, (*post, p.* 434), *if the defendant be acquitted of the murder, (and the jury find that she was delivered of a child, and it appear in evidence that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof), the jury may find her guilty of the concealment, and she shall thereupon be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years.*

*This enactment extends to a trial on the coroner's inquest, as well as upon a bill found by the grand jury.* *R.* v. *Cole*, 2 *Leach*, 1095; 3 *Camp.* 371: *R.* v. *Maynard*, *R. & R.* 240. *No person but the mother can be so convicted.* *Reg.* v. *Wright*, 9 *C. & P.* 754.

*Evidence.*

Prove that the prisoner was delivered of the child, which is usually done by circumstantial evidence; (*see ante, p.* 122); prove that the child was alive when born; and prove the murder, as directed *ante, p.* 406 *et seq.* If you fail in proving the delivery, the defendant may still be convicted of the murder or manslaughter; or if you succeed in proving the delivery, and that the defendant concealed the birth of the child, but fail in proving that it was born alive, or fail in proving the murder in other respects, the defendant may nevertheless be convicted of the concealment; and in the latter case it will not be necessary to prove whether the child died before, at, or after its birth. 9 *G.* 4, *c.* 31, *s.* 14, *infrà.* Where, however, the indictment for murder is bad for not describing the child properly, the defendant cannot be convicted on that indictment for the concealment. *Reg.* v. *Hicks*, 2 *M. & Rob.* 302.

It must be proved that the child was born alive; that is, that it was alive after the whole body of the child was in the world; *R.* v. *Poulton*, 5 *C. & P.* 329: *R.* v. *Crutchley*, 7 *C. & P.* 814: *R.* v. *Sellis*, *Id.* 850; and there must be an independent circulation in the child before it can be accounted alive; *R.* v. *Enoch*, 5 *C. & P.* 539: *Reg.* v. *Wright*, 9 *C. & P.* 754; but it seems that the circumstance of its being still connected with the mother by the umbilical cord will not prevent the killing of it from being murder. *R.* v. *Crutchley*, *suprà*: *Reg.* v. *Reeves*, 9 *C. & P.* 25.

Putting the lungs of the child into water was formerly a very usual test for ascertaining whether the child was born alive or not: if the lungs floated, it was presumed that the child was born alive; otherwise, if they sunk; at present, however, very little confidence is placed in this test, as to the lungs floating, particularly if the child were dead any length of time before the experiment was made. Moreover, a child may be born alive, and not breathe for some time after its birth—*per Parke*, J., *R.* v. *Brain*, 6 *C. & P.* 349. If the child appear to have arrived at its *debitum partûs tempus*, the presumption is that it was born alive; and if, in addition to this, it be proved that there were marks of violence on the child, sufficient to have caused its death, the presumption becomes very strong indeed.

As to the concealment, *see the evidence to the next precedent.*

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MOTHERS CONCEALING THE BIRTH OF CHILDREN.

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*Statute.*

9 *G.* 4, *c.* 31, *s.* 14]—Enacts, that if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof,

every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: Provided always, that if any woman tried for the murder of her child shall not be convicted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted, to find, in case it shall appear in evidence that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth.

*Indictment.*

*Commencement as in the last precedent*]—in the county aforesaid, being then and there big with a child, was then and there delivered of the said child alive, which said child then and there instantly died: and that the said A. S., being so delivered of the said child as aforesaid, did then and there unlawfully endeavour to conceal the birth of the said child, by secretly burying ("*by secret burying or otherwise disposing of*") the dead body of the said child; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a second count, stating that the child was born dead, and state the means of concealment specially, when it is otherwise than by secret burying. An indictment for concealing the birth "by secretly disposing of the dead body," &c., without shewing the mode of disposing of it, is bad. Reg.* v. *Hounsell, 2 M. & Rob.* 292. *Where the indictment charged that the defendant cast and threw the dead body of the child into the soil in a certain privy, "and did thereby then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof," it was held sufficient; the word "thereby" being referred as well to the endeavour as to the disposing of the body. Reg.* v. *Coxhead,* 1 *C. & K.* 623. *The indictment need not state whether the child died before, at, or after its birth. Id.*

*Misdemeanor, imprisonment, with or without hard labour, in the common gaol or house of correction, not exceeding two years.* 9 *G.* 4, *c.* 31, *s.* 14. *This offence is not triable at any quarter sessions.* 5 *& 6 Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant was delivered of a male or female child as stated in the indictment; that the child was dead; it is immaterial whether it died before, at, or after its birth; 9 *G.* 4, *c.* 31, *s.* 14; and prove the concealment, &c., in the mode stated in the indictment. Upon the statute 21 *J.* 1, *c.* 27, (which made the concealment of the birth of a bastard child in effect conclusive evidence of the murder), if any person, even an accomplice, were present at the time of the birth, *R.* v. *Peat,* 1 *Fost. P. C.* 220, or if the mother called for help, or had previously confessed her pregnancy, *Id.* 228, these circumstances were holden to negative the concealment; but where a woman, delivered of a seven months' child, threw it down

the privy, and it appeared that another woman, charged as an accomplice, knew of the birth; upon an indictment for murder against the two, the jury found the mother guilty of the concealment; and the point being saved upon a doubt whether it was a case within the statute 43 *G.* 3, *c.* 58, as a second person knew of the birth, the judges held that the act of throwing the child down the privy was evidence of the endeavour to conceal the birth, and that the conviction was right. *R.* v. *Cornwall, R. & R.* 336. Where a woman was delivered of a child, the dead body of which was found in a bed amongst the feathers, but there was no evidence to shew who put it there, and it appeared that the mother had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal of the charge for endeavouring to conceal the birth. *R.* v. *Higley*, 4 *C. & P.* 366. But where the mother caused the body of her child to be secretly buried, with a view to conceal the birth, it was holden that she might be convicted of the concealment, though she had previously allowed the birth to be known to some persons. *R.* v. *Douglas*, 1 *Mood. C. C.* 480. On the other hand, the denial of the birth only is not sufficient to convict her; she must be proved to have done some act of disposal of the body after the child was dead. *Reg.* v. *Turner*, 8 *C. & P.* 755. And it has been ruled in several cases, that a *final* disposing of the body must be shewn, and that hiding it in a place from which a further removal was contemplated, will not support the indictment; *Reg.* v. *Snell*, 2 *M. & Rob.* 44: *Reg.* v. *Ash*, *Id.* 294: *Reg.* v. *Bell*, *Ib.*; but those cases are overruled by *Reg.* v. *Goldthorpe*, 2 *Mood. C. C.* 244; *C. & Mar.* 335, where it was holden by a majority of the judges, that the putting of the dead body between a bed and a mattress was a sufficient disposing of it to constitute an offence within the statute.

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## CAUSING ABORTION.

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### *Statute.*

7 *W.* 4 & 1 *Vict. c.* 85, *s.* 6]—Enacts, that whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sect. 8—*Place and Mode of Confinement*]—Enacts, that when any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confine-

ment for any portion or portions of such imprisonment, or imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

### *Indictment for administering Poison to procure Miscarriage.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, feloniously and unlawfully did administer to, and cause to be taken by one A. N., ("*administer to her, or cause to be taken by her*"), a large quantity of a certain noxious thing called savin, to wit, two ounces of the said noxious thing called savin, ("*poison or other noxious thing*"), with intent then and there and thereby to procure the miscarriage of the said A. N., against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If there be any doubt as to the drug administered, it may be prudent, perhaps, to state it in different ways, in several counts, and add a count stating it to be* "a certain noxious thing to the jurors aforesaid unknown."

*Felony, transportation for life, or for not less than fifteen years, or imprisonment not exceeding three years, 7 W. 4 & 1 Vict. c. 8, s. 6, with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s. 8. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1, (ante, p. 69).*

### *Evidence.*

To support this indictment, it must be proved:—

1. That the defendant administered to or caused to be taken by A. N., the poison, &c. mentioned in the indictment: or, perhaps, proof of any other substance or thing *ejusdem generis* would be sufficient, as in the case of murder. (*See ante, p.* 406). *R.* v. *Phillips*, 3 *Camp.* 74: *R.* v. *Coe*, 6 *C. & P.* 403. Where the defendant gave the prosecutrix a cake containing poison, which she merely put into her mouth and spit out again, and did not swallow any part of it, it was holden that the mere delivery to the woman did not constitute an administering within the meaning of the statute, although the judges seemed to think that swallowing it was not essential. *R.* v. *Cadman*, 1 *Mood. C. C.* 114. But it is not necessary that there should be an actual delivery by the hand of the defendant. *R.* v. *Harley*, 4 *C. & P.* 369. It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended, as in another case under this section of the statute (*see post, p.* 438); but it must also appear that the drug administered was either a "poison" or a "noxious thing."

2. It must be proved that the drug in question was administered with intent to procure the miscarriage of A. N. Whether it were in fact a drug likely or calculated to produce that effect, seems to be immaterial, provided the intent be proved, and the drug were "a poison" or "other noxious thing."

3. The statutes 43 *G.* 3, *c.* 58, and 9 *G.* 4, *c.* 31, *s.* 14, contained provisions applicable to women quick and not quick with child, and so clearly shewed, that, to be an offence within those acts, the woman must have been pregnant at the time. *See R.* v. *Scudder*, 1 *Mood. C. C.* 216; 3 *C. & P.* 605. But in this act these provisions are omitted, and the offence is to procure the miscarriage of "any woman." It would therefore seem to be immaterial whether the woman was or was not pregnant at the time.

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*Indictment for using Instruments to procure Miscarriage.*

*Commencement as in the last precedent*]—in the county aforesaid, feloniously and unlawfully did use a certain instrument, ("*any instrument or other means whatever*"), called a ——, by then and there [*state the mode of using the instrument*], with intent, &c. [*as in the last precedent*].

*Felony. See the last precedent.*

*Evidence.*

The evidence will be the same as in the last case, with this exception, that instead of proving the administering of the poison, &c., it must be proved that the defendant used the instrument mentioned in the manner described in the indictment. If the prosecutor fail in proving the intent, the defendant may be convicted of an assault. 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253; *and see p.* 258).

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POISONING WITH INTENT TO MURDER, &C.

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*Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 2]—Enacts, that whosoever shall administer to or cause to be taken by any person, any poison or other destructive thing, or shall stab, cut, or wound any person, or shall by any means whatsoever cause to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof, shall suffer death.

*Indictment for administering Poison with intent to Murder.*

*Commencement as ante, p.* 437]—in the county aforesaid, feloniously and unlawfully did administer to one J. N., ("*administer to or cause to be taken by any person*"), a large quantity of a certain deadly poison called white arsenic, to wit, two drachms of the said white arsenic, ("*any poison or destructive thing*"), with intent then and there and thereby feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count stating that the*

*defendant* "did cause to be taken by J. N. a large quantity," &c.; *and, if the description of poison be doubtful, add counts describing it in different ways; add one count stating it to be* "a certain destructive thing to the jurors aforesaid unknown." *The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the sponge to be destructive, was holden bad. R.* v. *Powles,* 4 *C. & P.* 571. *If there be any doubt whether the poison was intended for J. N., add a count stating the intent to be "to commit murder" generally. See Reg* v. *Ryan,* 2 *M. & Rob.* 213, *infra.*

*Felony, death.* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 2. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, (*ante, p.* 251). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove the administering of the poison, &c., as directed *ante, p.* 437. Where a female servant, in preparing the breakfast for her mistress, put arsenic into the coffee, and afterwards told her mistress that she had prepared the coffee for her, and she (the mistress) drank the coffee; *Park,* J., held that it was an administering within the meaning of the statute. *R.* v. *Harley,* 4 *C. & P.* 369. So also, where the defendant knowingly gave poison to A. to administer as a medicine to B., but A. neglecting to do so, it was accidentally given to B. by a child, this was holden to be an administering by the defendant, as much as if she had given it to B. with her own hands. *Reg.* v. *Michael,* 2 *Mood. C. C.* 120; 9 *C. & P.* 356. Where the prisoner, having mixed corrosive sublimate with sugar, put it into a parcel, directing it "Mrs. Daws, Townhope," and left it on the counter of a tradesman, who sent it to Mrs. Davis, who used some of the sugar, *Gurney,* B., held it to be an administering; for that, although it was intended for Mrs. Daws, yet, as it found its way to Mrs. Davis, it was as much within the act as if it had been intended for Mrs. Davis. *R.* v. *Lewis,* 6 *C. & P.* 161. In *Reg.* v. *Ryan,* 2 *M. & Rob.* 213, however, *Parke,* B., after consulting *Alderson,* B., expressed an opinion that an indictment for causing poison to be taken by A., with intent to murder A., was not sustained by evidence shewing that the poison, though taken by A., was intended for another person; and doubted the propriety of the decision in *R.* v. *Lewis:* and accordingly, after the defendant had been convicted, he directed a fresh indictment to be preferred, charging the intent to be generally "to commit murder;" upon which the defendant was again tried, convicted, and sentenced. Prove also the intent to murder, by circumstances from which that intent may be implied. (*See ante, p.* 104). *R.* v. *Voke, R. & R.* 531. Evidence of administering at different times may be given, to shew the intent. *R.* v. *Mogg,* 4 *C. & P.* 364.

If the prosecutor fail in establishing the intent, the defendant cannot, as it seems, be found guilty of an assault under 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253); at least unless the indictment charge and the evidence prove an assault. *Reg.* v. *Dilworth,* 2 *M. & Rob.* 561: *Reg.* v. *Draper,* 1 *C. & K.* 176.

### ATTEMPT TO POISON.

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*Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 3]—Enacts, that whosoever shall attempt to administer to any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

*Indictment for attempting to Poison, with Intent, &c.*

*Commencement as ante, p.* 437]—in the county aforesaid, feloniously and unlawfully did attempt to administer to one J. N. a large quantity of a certain deadly poison called white arsenic, to wit, two drachms of the said white arsenic, ("*any poison or other destructive thing*"), with intent, &c., *as in the last precedent.*

*Felony, transportation for life or not less than fifteen years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 3, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 8, (*ante, p.* 437). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove the attempt to administer the poison or other destructive thing, as stated in the indictment. The circumstances stated in *R.* v. *Cadman*, 1 *Mood. C. C.* 114, (*ante, p.* 437), would probably support this indictment. Prove the intent, as in the last case. It is immaterial whether bodily injury be or be not effected.

The delivery of poison to an agent, with directions to him to cause it to be administered to another, under such circumstances that, if administered, the agent would be the sole principal felon, is not an attempt to administer within the statute. *Reg.* v. *Williams*, 1 *C. & K.* 589.

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SECT. 2.

### MANSLAUGHTER.

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*Statute.*

9 *G.* 4, *c.* 31, *s.* 9]—Enacts, that every person convicted of manslaughter shall be liable, at the discretion of the court, to be trans-

ported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years, or to pay such fine as the court shall award.

Sect. 10—*Homicide not felonious*]—Provides and enacts, that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.

*Indictment.*

The form of the indictment for manslaughter is the same as an indictment for murder, omitting the words "*of his malice aforethought*" throughout, and the word "*murder*" in the latter part of it. It need not conclude *contra formam statuti*. *R.* v. *Chatburn*, 1 *Mood. C. C.* 403: *R.* v. *Berry*, 1 *M. & Rob.* 463. The evidence is also the same, with this exception, that, in murder, the prosecutor need only prove the homicide, without going into evidence of the circumstances under which it was committed; in manslaughter, he must give evidence of all the facts of the case, so as to prove the homicide to be manslaughter. As to the cases in which a homicide amounts to manslaughter only, and not to murder, *see ante, p.* 410 *et seq.*

Under this indictment, or on the coroner's inquisition, the defendant, if acquitted of the manslaughter, may be convicted of an assault, under 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253). *Reg.* v. *Poole*, 9 *C. & P.* 728. [*See Reg.* v. *Phelps*, 2 *Mood. C. C.* 240; *C. & Mar.* 180: *Reg.* v. *M'Phane*, *C. & Mar.* 212: *Reg.* v. *Crumpton*, *Id.* 597: *Reg.* v. *Lewis*, 1 *C. & K.* 419, (*ante, p.* 405). *Manslaughter is felony, punishable with transportation for life, or for not less than seven years, or with imprisonment, with or without hard labour, not exceeding four years, or with fine.* 9 *G.* 4, *c.* 31, *s.* 9. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

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## Sect. 3.

### ASSAULT.

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*Indictment for a Common Assault.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and our lady the Queen then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill treat, and other wrongs to the said J. N. then and there did, to the great damage of the said J. N., and against the

peace of our lady the Queen, her crown and dignity. *If the assault were committed under circumstances of aggravation, you may state them.*

*Misdemeanor, punishable with fine or imprisonment, or both. A defendant indicted for any felony which includes an assault on the person, may now, by 7 W. 4 & 1 Vict. c. 85, s. 11, (ante, p. 253), be acquitted of the felony and found guilty of an assault only, and in such case may be sentenced to imprisonment with hard labour. (See ante, p. 258). The court will not pass judgment for an assault during the pendency of an action for the same assault. R.* v. *Mahon, 4 Ad. & Ell.* 575.

### *Evidence for the Prosecution.*

*Did make an Assault.*]—An assault is an attempt to commit a forcible crime against the person of another; such as an attempt to commit a battery, murder, robbery, rape, &c. The present is an indictment for an attempt to commit a battery, and also for a battery actually committed; and if the prosecutor prove either, the defendant must be convicted. Striking at another with a cane, stick, or fist, although the party striking misses his aim; 2 *Rol. Abr.* 545, *pl.* 45; drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a gun at a man who is within the distance to which the gun will carry; pointing a pitchfork at him, when within reach of it; or any other act indicating an intention to use violence against the person of another, is an assault. 1 *Hawk. c.* 62, *s.* 1. If a master take indecent liberties with a female scholar, without her consent, though she does not resist, it is an assault. *R.* v. *Nichol, R. & R.* 130; *see Reg.* v. *Day*, 9 *C. & P.* 722. But an attempt to commit the misdemeanor of having carnal knowledge of a girl between ten and twelve years old, is not an assault, by reason of the consent of the girl. *Reg.* v. *Meredith*, 8 *C. & P.* 589: *Reg.* v. *Martin*, 2 *Mood. C. C.* 123; 9 *C. & P.* 213, 215. (*See post, p.* 484). If a medical man unnecessarily strip a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault, if he himself take off her clothes. *R.* v. *Rosinski*, 1 *Mood. C. C.* 12. So, if parish officers cut off the hair of a pauper in the poorhouse by force and against her will, it is an assault. *Forde* v. *Skinner*, 4 *C. & P.* 239. An unlawful imprisonment is also an assault. Where the defendants took a newborn child from the mother, under pretence of taking it to an institution to be nursed, and put it into a bag, and hung the bag with the child in it on some palings by the way-side, this was held to be an assault. *Reg.* v. *March*, 1 *C. & K.* 496. Mere words, however, can never amount to an assault. 1 *Hawk. c.* 62, *s.* 1. So, if a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. *Com. Dig., Battery*, (C.) But if A. advance in a threatening attitude towards B. to strike him, and be stopped just before he is near enough for his blow to take effect, it is an assault. *Stephens* v. *Myers*, 4 *C. & P.* 349. The causing a deleterious drug to be taken by another has been holden to be an assault. *Reg.* v. *Button*, 8 *C. & P.* 660; *but see Reg.* v. *Dilworth*, 2 *M. & Rob.* 531, *contrà.*

*Did beat, wound, and ill treat.*]—A battery, in the legal acceptation of the word, includes beating and wounding. To beat, also, in the legal acceptation of the term, means not merely to strike

forcibly with the hand, or a stick, or the like, but includes every touching or laying hold (however trifling) of another's person or clothes, in an angry, revengeful, rude, insolent, or hostile manner: 1 *Hawk. c.* 62, *s.* 2; *see Rawlings* v. *Till*, 3 *M. & W.* 28: as, for instance, thrusting or pushing him in anger—*per Holt*, C. J., 6 *Mod.* 142; holding him by the arm; spitting in his face; 6 *Mod.* 172; jostling him out of the way; 6 *Mod.* 149; pushing another man against him; *Bull. N. P.* 16; throwing a squib at him; 2 *W. Bl.* 892; striking a horse upon which he is riding, whereby he is thrown; 1 *Mod.* 24; *W. Jones*, 444; or the like. If a man strike at another with a cane or fist, or throw a bottle at him, or the like, if he miss him, it is an assault; if he hit him, it is a battery. A wounding is where the violence is so great as to draw blood, by striking or stabbing with a sword, knife, or other instrument, or by shooting, or by striking with a cudgel, or fist, or the like. (*See post, p.* 452).

By 8 & 9 *Vict. c.* 100, *s.* 56, the abusing, ill treating, or wilful neglect of any patient in a lunatic asylum, is a misdemeanor.

*And other Wrongs.*]—Under the *alia enormia*, you may give in evidence any circumstance of aggravation attending the assault and battery, not of itself amounting to a distinct trespass. 2 *Phil. Ev.* 189.

### *Evidence for the Defendant.*

The defendant must prove, either that he is not guilty at all, or that the facts of the case do not amount to an assault or battery; or that he was justified or excused in law in what he did; or that the complaint has been already disposed of upon summary application before two justices. 9 *G.* 4, *c.* 31, *s.* 27. The two first defences are always given in evidence under the general issue, both in civil and criminal cases; matter of justification or excuse is specially pleaded in civil actions, but is always given in evidence under the general issue in criminal cases.

1. It is a good defence to prove that the alleged battery happened by misadventure. If a horse run away with his rider, and run against a man, it is no battery. *Gibbons* v. *Pepper*, 2 *Salk.* 637. If a soldier, in his ranks, discharge his gun, and a man unexpectedly pass before him at the time, and be hurt by it, it is no battery. *Moor.* 864; *Hob.* 134; *and see R.* v. *Gill*, 1 *Str.* 490. And there are many cases of accidents which cannot be set up as a defence in an action for a battery, that would certainly be a good defence upon an indictment: in civil cases, the accident must have been inevitable, in order to operate as an excuse; 2 *Rol. Abr.* 548, (G); *Hob.* 134; *Moor.* 864; *and see Str.* 596; but, in criminal cases, it may be deemed a general rule, that the same facts which would make a killing homicide by misadventure, (*see ante, p.* 420), will be a good defence upon an indictment for a battery.

2. It is a good defence to prove that the alleged battery was merely an amicable contest; as, that he wrestled with the prosecutor for a wager. *Com. Dig.*, *Pleader*, 3 *M.* 18. So, that it happened by accident whilst the defendant was engaged in some sport or game which

was neither unlawful nor dangerous, (*see ante, p.* 415), is a good defence.

3. It is a good defence to prove that the alleged battery was merely the correcting of a child by its parent, the correcting of a servant or scholar by his master, or the punishment of the criminal by a proper officer; *Com. Dig., Pleader,* 3 *M.* 19; 1 *Hawk. c.* 60. *s.* 23, *c.* 62, *s.* 2; *and see* 2 *B. & P.* 224; provided the correction be moderate in the manner, the instrument, and the quantity of it, or that the criminal be punished in the manner appointed by the law. (*See ante, p.* 418). It has been holden that the defendant may justify even a mayhem, if done by him as a military officer, for disobedience of orders. *Lane* v. *Degberg, Bull. N. P.* 12.

4. It is a good defence, in justification even of a wounding or mayhem, to prove that the prosecutor assaulted or beat the defendant first, and that the defendant committed the alleged battery merely in his own defence. 1 *Sid.* 246; 1 *Ro. Rep.* 19; 2 *Salk.* 642; 3 *Salk.* 46. If he prove an assault merely, as, for instance, that the prosecutor lifted up his staff and offered to strike him, it is sufficient to justify the defendant's striking him; for he need not, in such a case, stay till the other has actually struck him. *Bull. N. P.* 18; 2 *Rol. Abr.* 547, *l.* 37. So, a husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 2 *Rol. Abr.* 546, (D); 1 *Hawk. c.* 60, *ss.* 23, 24. But, in all these cases, the battery must be such only as was necessary to the defence of the party or his relation; for if it were excessive, if it were greater than was necessary for mere defence, or if it were after all danger from the assailment was past, and by way of revenge, the prior assault will be no justification. *Bull. N. P.* 18; *Reg.* v. *Driscoll, C. & Mar.* 214. Also, it will be a sufficient answer to this defence, to prove that the first assault was justifiable. *Com. Dig., Pleader,* 3 *M.* 15; 1 *Salk.* 407; *Carth.* 280; (*see ante, p.* 415).

5. The defendant may justify a battery, by proving that he committed it in defence of his possession: as, for instance, to remove the prosecutor out of the defendant's close or house; *Lutw.* 1455; *Hard.* 358; or to prevent him from entering it; 2 *Rol. Abr.* 548, *l.* 25; to restrain him from taking or destroying his goods, &c.; 2 *Rol. Abr.* 549, *l.* 7; from taking or rescuing cattle, &c., in his custody upon a distress; *Id. l.* 16; 2 *Bro. Ent.* 253; or the like. In the case of a trespass in law merely, without actual force, the owner of the close, &c., must first request the trespasser to depart, before he can justify laying his hand on him for the purpose of removing him; and, even if he refuse, he can only justify so much force as is necessary to remove him. *Weaver* v. *Bush,* 8 *T. R.* 299. *See* 2 *Rol. Abr.* 548, *l.* 35, 45; 2 *Salk.* 641. But if the trespasser use force, then the owner may oppose force to force; 2 *Salk.* 641; 8 *T. R.* 78; 1 *C. & P.* 6; and in such a case, if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer, however, to a justification in defence of his possession, the other party may prove that the battery was excessive; *Skin.* 387; *Lutw.* 1436; or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like.

6. It is a good defence to prove that the defendant, as an officer of justice, arrested the prosecutor by virtue of a certain writ of process, which is the alleged battery complained of. 2 *Rol. Abr.* 546, (A). A sheriff's officer, however, can only justify laying his hand upon a man, in order to arrest him upon a writ of process, *Harrison* v. *Hodgson*, 10 *B. & C.* 445, unless he resist, or an attempt be made to rescue him; 1 *L. Raym.* 229; 2 *Str.* 1049; 1 *C. & P.* 40; and even then, he can justify no greater degree of force than was necessary in order to secure the prisoner. And the same as to officers of justice, and persons acting in their aid arresting on suspicion of felony, without warrant; and as to private persons arresting men committing felonies in their presence, *see ante, p.* 425. So, a man may justify laying his hand upon another to prevent him from fighting, or committing a breach of the peace; *Com. Dig., Pleader*, 3 *M.* 16; or to prevent him from rescuing goods taken in execution; 3 *Lev.* 113; or the like. *See* 1 *Mod.* 168; 2 *Rol. Abr.* 546, *l.* 40. A coroner, *Garnett* v. *Ferrand*, 6 *B. & C.* 611, and a magistrate upon a preliminary inquiry, *Cox* v. *Coleridge*, 1 *B. & C.* 16, may justify a forcible exclusion of a party from the justice room, even though he be the attorney of the party accused; but if the inquiry be final and of a judicial nature, all persons have a right to be present. *Daubney* v. *Cooper*, 10 *B. & C.* 237. *See* 6 *&* 7 *W.* 4, *c.* 114, *s.* 2. Yet, even in these cases, he must not use more force than is requisite to restrain the other party, otherwise he cannot avail himself of the threatened breach of the peace, &c., as a justification.

7. It is a good defence to shew that the complaint has been disposed of by two justices, either by conviction or dismissal of the case, provided, in the former case, the defendant has paid the penalty, and suffered the imprisonment awarded; and, in the latter, the magistrates have dismissed the case, because it was justified, or so trifling as not to merit punishment, and this be forthwith certified under their hands. 9 *G.* 4, *c.* 31, *ss.* 27, 28. The magistrates have no power to hear and determine any assault involving a question of title to lands, &c., or any interest therein, or relating to any bankruptcy or insolvency, or any execution under the process of any court of justice: and if the assault be accompanied by any attempt to commit felony, or, in their opinion, be a fit subject for a prosecution by indictment, they may abstain from any adjudication, and leave the case to be prosecuted by indictment. 9 *G.* 4, *c.* 31, *s.* 29: *see Anon.*, 1 *B. & Ad.* 382. As to the mode of pleading this defence, *see ante, p.* 91. It is to be observed, that this provision does not prevent the prosecutor from preferring his indictment in the first instance, if he think fit.

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## *Indictment for an Aggravated Assault.*

*Commencement as ante, p.* 437]—in and upon one J. N., in the peace of God and our lady the Queen then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill treat; and that the said J. S., with both his hands, then and there violently cast, flung, and threw the said J. N. to, upon, and against a certain brick floor there, and him the said J. N.

in and upon his head, neck, breast, sides, back, and other parts of his body, with both the feet of him the said J. S., then and there violently and grievously did kick, strike, and beat, giving to the said J. N. then and there, as well by such flinging, casting, and throwing of him the said J. N., as also by such kicking, striking, and beating of the said J. N. as aforesaid, in and upon the head, neck, breast, sides, back, and other parts of the body of him the said J. N., divers bruises, hurts, and wounds, so that his life was greatly despaired of; and other wrongs, &c., *as in the precedent, ante, p.* 441. *Add a count for a common assault, as ante, p.* 441.

*As to the evidence, see ante, p.* 442 *et seq.*

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*Indictment for assaulting a Woman quick with Child.*

*Commencement as ante, p.* 441]—in and upon A., the wife of J. N., in the peace of God and our lady the Queen then and there being, and also then and there being quick with child, did make an assault, and her the said A. then and there did beat, wound, and ill treat, so that her life was greatly despaired of, and by reason whereof she the said A. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did bring forth the said child dead; and other wrongs, &c., *as in the precedent ante, p.* 448. *Add a count for a common assault.*

*As to the evidence, see ante, p.* 442 *et seq. If the child were born alive, and died afterwards of the injuries received by it when the mother was beaten, the offence would be murder.* 3 *Inst.* 50. *As to when a woman is properly said to be "quick with child," see Reg.* v. *Wycherley,* 8 *C. & P.* 263; *and the note, p.* 264.

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ATTEMPTS TO DROWN, SHOOTING, &C.

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*Statute.*

7 *W.* 4 & 1 *Vict. c.* 85, *s.* 3.]—(*Ante, p.* 440).

*Indictment for an attempt to Drown, &c., with Intent, &c.*

*Commencement as ante, p.* 441]—in the county aforesaid, feloniously and unlawfully did take one J. N. into both the hands of him the said J. S., and then and there feloniously and unlawfully did cast, throw, and push the said J. N. into a certain pond there situate, wherein there was a great quantity of water, and did thereby then and there feloniously and unlawfully attempt the said J. N. to drown and suffocate, ("*drown, suffocate, or strangle*"), with intent then and there and thereby feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count charging generally that the defendant did attempt to drown J. N., &c.*

*Felony.* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 3. *See the punishment, ante, p.* 439. *None of the offences mentioned in this section are triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove the attempt to drown, as stated in the indictment, and the intent, as directed *ante, p.* 104. If the prosecutor fail in proving the intent, the defendant may be convicted of the assault. 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253); *see p.* 258. It is immaterial whether bodily injury be or be not proved.

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*Indictment for Shooting with Intent to murder.*

*Commencement as ante, p.* 441]—in the county aforesaid, a certain gun, then and there loaded with gunpowder and divers leaden shot, which he the said J. S. in both his hands then and there had and held, at and against one J. N., then and there feloniously and unlawfully did shoot, with intent, &c., *as in the last precedent. Add counts for shooting with intent to maim, &c., as post, p.* 454.

*Felony.* 7 *&* 8 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 3. *See the last precedent.*

*Evidence.*

Prove the shooting, as stated in the indictment, and that the gun was loaded in such a maner as to produce the effect intended. *See R.* v. *Carr,* (*post, p.* 448). Where an indictment alleged that the defendant shot at the prosecutrix with a loaded pistol; in one set of counts, with a pistol loaded with gunpowder only; and in another set of counts, with a pistol loaded with gunpowder and other destructive materials; and it appeared that the pistol contained no ball or shot, but gunpowder and wadding only, the judge told the jury, that whether the pistol was loaded with gunpowder and ball or other destructive materials, or with gunpowder and paper only, if the prisoner fired it so near the person of the prosecutrix, and in such a direction as that it would probably kill her, or do her some grievous bodily harm, the case was within the statute; and the judges held this direction to be right. *R.* v. *Kitchen, R. & R.* 95. But if it be alleged that the gun was loaded with powder and a bullet, it must be proved to have been loaded with a bullet, otherwise the defendant must be acquitted. *R.* v. *Hughes,* 5 *C. & P.* 126. Where the shot was fired from the barrel of a percussion gun, by the prisoner striking the cap, which was upon the nipple of the barrel, *Patteson,* J., held it to be within the act; and, after consulting several of the judges, refused to reserve the point. *R.* v. *Coates,* 6 *C. & P.* 394. Prove also the intent, as directed *ante, p.* 104. In *Reg.* v. *Jones,* 9 *C. & P.* 258, *Patteson,* J., appeared to think it doubtful whether, upon this section of the statute, it must not appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued; he said, however, that the circumstance that it would have been murder if death had insued would be a good ground whence the jury might infer the existing intent, as every man

must be taken to intend the necessary consequences of his acts. Upon an indictment for shooting at H. with intent to murder H., it appeared that the defendant intended to shoot at and kill L., but shot at H. by mistake, and *Littledale*, J., left it to the jury to say, whether the defendant intended to murder H.: and upon their finding that he shot at H. intending to murder L., directed an acquittal. *R.* v. *Holt*, 7 *C. & P.* 518. It should be observed, that this case occurred upon the stat. 9 *G.* 4, *c.* 31, the words of which were "with intent to murder *such* person." It would seem, however, from the decision upon the words of this same section, in *Reg.* v. *Ryan*, 2 *M. & Rob.* 213, (*ante, p.* 439), that the intent must still be proved as laid; and therefore, that an allegation of an intent to murder A. would not be satisfied, if it appeared that, although A. was struck, the shot was intended for another person. If the intent is not made out, the defendant may be convicted of the assault. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253; *see p.* 258).

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### *Indictment for attempting to Shoot, with Intent, &c.*

*Commencement as ante, p.* 441]—in the county aforesaid, did by drawing the trigger ("*drawing the trigger, or in any other manner*") of a certain pistol, ("*any kind of loaded fire-arms*"), then and there loaded with gunpowder and one leaden bullet, which said pistol the said J. S. in his right hand then and there had and held, feloniously and unlawfully attempt to discharge the said pistol at and against one J. N., with intent, &c., *as in the precedent, ante, p.* 447. *Add counts for attempting to shoot, with intent to maim, &c., as post, p.* 454. *The indictment need not, in the latter clause, describe it as "the said pistol so loaded as aforesaid." Reg.* v. *Baker*, 1 *C. & P.* 254.

*Felony.* 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 3. *See the punishment, ante, p.* 440.

### *Evidence.*

Prove that the defendant presented a pistol or gun at J. N., and attempted, by pulling the trigger, to discharge it at him. Where, upon an indictment for attempting to discharge a gun at J. S., it appeared that the gun was loaded, but the jury found that it was not primed, a majority of the judges considered it equivalent to a finding that it was not so loaded as to be capable of doing mischief by pulling the trigger, and were therefore of opinion, that it was not *loaded* within the meaning of the statute. *R.* v. *Carr, R. & R.* 377; *see Reg.* v. *Baker*, 1 *C. & K.* 254: *Reg.* v. *James, Id.* 530. So, if a pistol be loaded with powder and a bullet, but the touch hole be plugged so that it cannot possibly be fired, it is not "loaded arms," within the meaning of the statute. *R.* v. *Harris*, 5 *C. & P.* 159. And in such cases, the defendant cannot be convicted of an assault, under 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11. *Reg.* v. *Baker, Reg.* v. *James, suprà.* Prove the intent, as directed *ante, p.* 104; but if this be not proved, the defendant may be convicted of the assault. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253; *see p.* 258, *and post, p.* 454).

## STABBING, &c., WITH INTENT TO MURDER.

### *Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 2.]—(*Ante, p.* 438).

### *Indictment for Stabbing, &c., with Intent to Murder.*

*Commencement as ante, p.* 441]—in the county aforesaid, one J. N., in and upon the right side of the belly, between the short ribs of him the said J. N., then and there feloniously and unlawfully did stab, cut, and wound, ("*stab, cut, or wound*"), with intent, *&c., as in the precedent, ante, p.* 446. *Add counts for stabbing,* &c., *with intent to maim, &c., as post, p.* 450.

*Felony, death.* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 2, (*ante, p.* 438). *This sentence may be recorded.* 4 *G.* 4, *c.* 48, (*ante, p.* 251). *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove that the defendant cut, stabbed, or wounded J. N. (*See post, p.* 451). The instrument or means by which the wound was inflicted need not be stated, and, if stated, do not confine the prosecutor to prove a wound, &c., by such means. *R.* v. *Briggs,* 1 *Mood. C. C.* 318. Evidence of a stabbing only will not support an allegation of cutting only. *R.* v. *M'Dermott, R. & R.* 356. Prove the intent, as directed *ante, p.* 104. *See Reg.* v. *Jones,* (*ante, p.* 447). It is not necessary that the prosecutor should be cut in a vital part; for the question is not what the wound is, but what wound was intended. *R.* v. *Hunt,* 1 *Mood. C. C.* 93: *R.* v. *Griffith,* 1 *C. & P.* 298. Nor is it material whether bodily injury were or were not effected. If the intent be not proved, the defendant may nevertheless be convicted of an assault. 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253; *see p.* 258).

### *Indictment for causing bodily Injury, with Intent to Murder.*

*Commencement as ante, p.* 441]—in the county aforesaid, feloniously did cause unto J. N. a certain bodily injury dangerous to life, ("*any bodily injury dangerous to life*") by then and there feloniously [*state the mode in which the injury was occasioned*], with intent, in so doing, him the said J. N. then and there and thereby feloniously, wilfully, and of his malice aforethought, to kill and murder, and thereby then and there did grievously injure the said J. N. in his body; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It is not necessary to state in the indictment the nature of the bodily injury occasioned to the prosecutor; and, if it were, that would be sufficiently done by the statement of the means whereby it was inflicted. Reg.* v. *Cruse,* 2 *Mood. C. C.* 53; 8 *C. & P.* 541.

*Felony, death.* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 2, (*ante, p.* 438). *This*

*sentence may be recorded.* 4 *G.* 4, *c.* 48, (*ante, p.* 251). *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove the act done as stated in the indictment, and that it caused a bodily injury dangerous to life. It has been ruled, that on an indictment upon this clause, the jury ought not to convict, unless they be satisfied that the defendant had in his mind, at the time of the offence, a positive intention to murder; and that it is not sufficient that it would have been murder if death had ensued. *Reg.* v. *Cruse*, 8 *C.* & *P.* 541. If the evidence fail in proving the intent, or that the injury was dangerous to life, the defendant may nevertheless be convicted of the assault. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253).

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STABBING, SHOOTING, &c., WITH INTENT TO MAIM, &c.

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*Statute.*

7 *W.* 4 & 1 *Vict. c.* 85, *s.* 4]—Enacts, that whosoever unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall stab, cut, or wound any person, with intent in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

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*Indictment for Stabbing, &c., with Intent to Maim, &c.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, one J. N., in and upon the right side of the belly, between the short ribs of him the said J. N., then and there feloniously, unlawfully, and maliciously did stab, cut, and wound, ("*stab, cut, or wound*"), with intent, in so doing, him the said J. N. thereby then and there to maim; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*).—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, [*&c., as in the last count*], with intent, in so doing, him the said J. N. thereby then and there to disfigure; against the form of the statute, &c. (*3rd Count*).—*Same as the last;* with intent, in so doing, him the said J. N. thereby

then and there to disable; against the form, &c. (*4th Count*).—*Same as the last;* with intent, in so doing, to him the said J. N. thereby then and there to do some grievous bodily harm; against the form, &c. (*5th Count*).—*Same as the last;* with intent, in so doing, thereby then and there to prevent ("*resist or prevent*") the lawful apprehension ("*apprehension or detainer*") of the said J. S. ("*any person*"); against the form, &c. *An indictment charging the act to have been done "feloniously, wilfully, and maliciously," is bad, the words of the stat. being "unlawfully and maliciously." R. v. Ryan, 2 Mood. C. C.* 15. *In practice, the first count of the indictment is for stabbing with intent to murder. (See ante, p.* 449). *These counts may be joined, though the punishment is different. R. v. Strange,* 8 *C. & P.* 172.

*Felony, transportation for life, or for not less than fifteen years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 4, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 8, (*ante, p.* 436).

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

*Feloniously, unlawfully, and maliciously.*]—By stat. 9 *G.* 4, *c.* 31, *s.* 12, it was necessary that the offence should have been committed under such circumstances, that if death had ensued therefrom, it would have amounted to murder. This proviso is omitted from the new statute, which would seem to include every act done without lawful excuse with any of the intents mentioned in the statute, for from the act itself malice will be inferred. The word "maliciously" in the statute does not mean malice aforethought; for, if it did, the offence would be included under the second section. The offence is therefore equally within this section, although, if death had ensued, it would have been manslaughter only. *R.* v. *Griffiths,* 8 *C. & P.* 248: *Reg.* v. *Nicholls,* 9 *C. & P.* 267; *Anon.,* 2 *Mood. C. C.* 40.

*In and upon the right Side &c.*]—This is proved as in murder. (*See ante, p.* 408). The instrument or means by which the injury was inflicted need not be stated in the indictment, and if stated, need not be proved as laid. *R.* v. *Briggs,* 1 *Moo. C. C.* 318. Upon an indictment which charged a wound to have been inflicted by striking with a stick and kicking with the feet, proof that the wound was caused either by striking with a stick or kicking was holden sufficient, though it was uncertain by which of the two the injury was inflicted. *Ib.*

*Did stab, cut, and wound.*]—If the indictment be for cutting, evidence of a stabbing will not support it, for the statute uses the words *stab, cut, or wound,* in the alternative. *R.* v. *M'Dermott, R. & R.* 356. Under the words "stab" or "cut," an incised wound must be proved; a mere contused or lacerated wound is not within those words. Where it appeared that the prisoner struck the prosecutor on the back of the head with a cavalry sword which was at the time in a steel scabbard, and lacerated the skin of the head, which bled considerably, *Bayley,* J., held that it was not a case within the statute 43 *G.* 3, *c.* 58. *R.* v. *Whitfield, Salop Sum. Ass.*

1822, 1 *Russ.* 728. So, it has been holden, that a blow with a square iron bar, which inflicted a contused or lacerated wound, was not within that statute; *R.* v. *Adams*, 1 *Russ.* 728; and the same with respect to a blow with the handle of a windlass. 5 *Ev. Stat.* 334. But if a cutting be inflicted, the case is within the statute, though the instrument be not intended for cutting. Thus, where a man struck a woman in the face with the claw of a hammer, and it cut her, it was holden to be a cutting within the statute. *R.* v. *Atkinson*, *R. & R.* 104. And where the defendant struck the prosecutor with an iron crow, not intended for cutting, and it cut out part of his skull, it was holden that the defendant was properly convicted. *R.* v. *Hayward*, *R. & R.* 78. The word *stab* imports a wound made with a pointed instrument—the word *cut*, a wound with an instrument having an edge; but the word *wound* includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gun-shot wounds. This latter word was not in the repealed statute, and is of more comprehensive meaning than the two former words. But to constitute a wound within the meaning of the statute, the continuity of the skin must be broken; *R.* v. *Wood*, 1 *Mood. C. C.* 278; or, in other words, the external surface of the body (that is, the *whole skin*, not the mere *cuticle* or upper skin, *Reg.* v. *M'Loughlin*, 8 *C. & P.* 635) must be divided. *R.* v. *Becket*, 1 *M. & Rob.* 526. *See R.* v. *Smith*, 8 *C. & P.* 173. But if the skin be broken, the nature of the instrument with which the injury is inflicted is immaterial. Thus, a wound from a kick is within the statute. *R.* v. *Briggs*, 1 *Mood. C. C.* 318. And where a hammer was thrown at a person, which struck him on the nose and broke the skin, it was holden to be a wound within the meaning of the statute. *R.* v. *Withers*, 1 *Mood. C. C.* 294. *See R.* v. *Payne*, 4 *C. & P.* 558. Where the defendant struck the prosecutor on the outside of his hat violently with an air-gun, and the hat wounded the prosecutor, but the air-gun never came in contact with the prosecutor, it was held to be a wounding. *R.* v. *Sheard*, 2 *Mood. C. C.* 13; 7 *C. & P.* 846. It is necessary, however, that some instrument should be used; therefore, where the defendant bit off the prosecutor's finger, it was held not to be a wounding within the statute. *R.* v. *Stevens*, 1 *Mood. C. C.* 409: *R.* v. *Harris*, 7 *C. & P.* 446. So also, where the defendant threw vitriol in the prosecutor's face and so wounded him, it was held not to be within the act. *R.* v. *Murrow*, 1 *Mood. C. C.* 456: *but see now* 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 5, (*post, p.* 455). So, the wound must be given by the defendant; for if in self-defence the prosecutor force a part of his body against an instrument in the defendant's hands, and so cut or wound himself, it is not within the stat. *R.* v. *Becket*, 1 *M. & Rob.* 526.

The statute extends to three species of assaults: namely, 1. To "shoot at" any person; 2. To attempt, "by drawing a trigger, or in any other manner," to discharge any kind of loaded arms at any person; 3. To "stab, cut, or wound" any person. And each of these may be done with any one of the following intents, namely, 1. To maim; 2. To disfigure; 3. To disable; 4. To do some other grievous bodily harm; 5. To resist or prevent the lawful apprehension or detainer of any person.

***With Intent, &c.***]—The intent must be proved as laid; hence the

necessity of several counts, charging the offence to have been committed with different intents. If an indictment allege that the defendant cut the prosecutor with intent to murder, to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension; *R.* v. *Duffin, R. & R.* 365: *R.* v. *Boyce,* 1 *Mood. C. C.* 29; unless, for the purpose of effecting his escape, the defendant also harboured one of the intents stated in the indictment; *R.* v. *Gillow,* 1 *Mood. C. C.* 85; for, where both intents exist, it is immaterial which is the principal and which the subordinate. Therefore, where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was holden that he was guilty of cutting with intent to do her grievous bodily harm, notwithstanding his principal object was to commit the rape. *R.* v. *Cox, R. & R.* 362. So also, if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm, *Reg.* v. *Bowen, C. & Mar.* 450. The intent, of course, can be proved by presumptive evidence only. (*Ante, p.* 104). But it may be stated as a general rule, that a man is answerable for his acts; and therefore, if intending to stab A. he stab B., he may be indicted for stabbing B., with intent, &c., and the facts will support the indictment. *But see R.* v. *Holt,* 7 *C. & P.* 518; *Reg.* v. *Ryan,* 2 *M. & Rob.* 213. (*Ante, p.* 439). If, however, it be doubtful whether the act was done by accident or design, other circumstances may be given in evidence to prove the intent. (*Ante, p.* 104). In the case of *R.* v. *Coke and Woodburn,* 6 *St. Tr.* 212, the defendants had the effrontery to set up as a defence, that the assault was committed by them with intent, not to maim or disfigure, but to murder; the court, however, held, that if a man attack another with intent to murder him, with an instrument which cannot but endanger the disfiguring of him, and in such attack happen not to kill but only to disfigure him, it was within the statute 22 & 23 *C.* 2, *c.* 1, *s.* 7, which made it felony to commit any of the offences there mentioned, with intent to maim or disfigure. The defendants were accordingly convicted and executed. 4 *Bl. Com.* 207, *n.* (*k*).

With respect to the intents mentioned in the statute it may be useful to observe, that to *maim* is to injure any part of a man's body which may render him, in fighting, less able to defend himself or annoy his enemy. 1 *Hawk. c.* 44, *s.* 1: *see Reg.* v. *Sullivan, C. & Mar.* 209. To disfigure, is to do some external injury which may detract from his personal appearance; and to disable, is to do something which creates a permanent disability, and not merely a temporary injury. *See R.* v. *Boyce,* 1 *Mood. C. C.* 29. It is not necessary that a grievous bodily harm should be either permanent or dangerous, and therefore, where the defendant cut the private parts of an infant, and the wound was not dangerous, and was small, but bled a good deal, and the jury found that it was a grievous bodily harm, it was holden that the conviction was right. *R.* v. *Cox, R. & R.* 362. Where the intent laid is to prevent a lawful apprehension, it must be shewn that the arrest would have been lawful; (*see ante, pp.* 423, 425); and where the circumstances are not such that the party must know why he is about to be apprehended, *R.* v. *Howarth,* 1 *Mood. C. C.* 207, (*ante, p.* 426), it must

be proved that he was apprized of the intention to apprehend him. *R.* v. *Rickets*, 3 *Camp.* 68. If the prosecutor fail in proving the intent, the defendant may nevertheless be convicted of an assault, and receive sentence of imprisonment with hard labour. 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253). *Reg.* v. *Griffith*, 8 *C. & P.* 248; *Anon.*, 2 *Mood. C. C.* 15: *Reg.* v. *W. Williams*, 8 *C. & P.* 285. (*See ante, p.* 258).

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### *Indictment for Shooting with intent to Maim.*

*Commencement as ante, p.* 441]—in the county aforesaid, a certain gun, then and there loaded with gunpowder and divers leaden shot, which said gun he the said J. S. in both his hands then and there had and held, at and against one J. N. then and there feloniously, unlawfully, and maliciously did shoot, with intent in so doing thereby then and there the said J. N. to maim; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts stating the various intents mentioned in the statute, as in the last precedent. In practice, the first count is for shooting with intent to murder, as ante, p.* 447.

*Felony.* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 4. *See the last precedent.*

#### *Evidence.*

Prove the shooting as directed *ante, p.* 447. Prove the intent as laid in some one of the counts. (*See ante, p.* 252).

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### *Indictment for attempting to Shoot, with Intent to Maim, &c.*

*Commencement as ante, p.* 441]—in the county aforesaid, by drawing the trigger ("*drawing a trigger, or in any other manner*") of a certain pistol, ("*any kind of loaded arms*"), then and there loaded and charged with gunpowder and one leaden bullet, which said pistol the said J. S. in his right hand then and there had and held, then and there feloniously, unlawfully, and maliciously did attempt to discharge the said pistol, so loaded and charged as aforesaid, at and against one J. N., with intent, [*&c., as in the last precedent but one*].

*Felony.* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 4. *See the last precedent but one.*

#### *Evidence.*

Prove the attempt to shoot, as directed *ante, p.* 448; and the intent as under the last two precedents. If a person, intending to shoot another, put his finger on the trigger of a loaded fire-arm, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms, within the statute. *Reg.* v. *St. George*, 9 *C. & P.* 483: *Reg.* v. *Lewis*, *Id.* 523. But the presenting of a loaded pistol at another is an assault of which the prisoner may be convicted on an indictment for the felony, under the stat. 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11; (*ante, p.* 253). *Reg.* v. *St. George, supra; but see Reg.* v. *Baker*, 1 *C. & K.* 254. And semble, though the pistol be not in fact loaded, if it be presented so near the person of another, as that it would have endangered him had it been loaded and gone off, and he

be ignorant that it is not loaded, that is an assault. *Ib.; but see Reg.* v. *James*, 1 *C. & K.* 530, *contra*; (*ante, p.* 448).

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SENDING EXPLOSIVE SUBSTANCES, &c.

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*Statute.*

*7 W.* 4 *&* 1 *Vict. c.* 85, *s.* 5]—Enacts, that whosoever shall unlawfully and maliciously send or deliver to, or cause to be taken or received by any person, any explosive substance or other dangerous or noxious thing, or shall cast or throw upon or otherwise apply to any person any corrosive fluid, or other destructive matter, with intent, in any of the cases aforesaid, to burn, maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, and whereby, in any of the cases aforesaid, any person shall be burnt, maimed, disfigured, or disabled, or receive some other grievous bodily harm, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

*Indictment for sending an explosive Substance, with Intent, &c.*

*Commencement as ante, p.* 441]—in the county aforesaid, feloniously, unlawfully, and maliciously did send ("*send or deliver to, or cause to be taken or received by, any person*") to one J. N. a certain explosive substance and dangerous and noxious thing, to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent in so doing him the said J. N. thereby then and there to burn, ("*burn, maim, disfigure, or disable*"), and him the said J. N. thereby then and there did burn; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts varying the intent and injury.*

*Felony, transportation for life or for any term not less than fifteen years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 5, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 8; (*ante, p.* 436).

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove the sending of the explosive substance, and the intent as directed *ante, p.* 104. Prove also that the prosecutor was burnt, as stated in the indictment. This is a new enactment, which was intended to meet the case of *R.* v. *Mountford*, 1 *Mood. C. C.* 441.

*Indictment for throwing corrosive Fluid, with Intent, &c.*

*Commencement* [*as ante, p.* 441]—in the county aforesaid, feloniously, unlawfully, and maliciously did cast and throw upon one J. N. a certain corrosive fluid and destructive matter, to wit, one pint of oil of vitriol, ("*any corrosive fluid or other destructive matter*"), with intent in so doing then and there and thereby him the said J. N. to burn, and him the said J. N. thereby then and there did grievously burn; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts varying the intent and injury.*

*Felony.* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 5. *See the last precedent.*

*Evidence.*

Prove that the defendant threw vitriol on the prosecutor; prove the intent as directed *ante, p.* 104; and the injury. The repealed stat. 6 *G.* 1, *c.* 2, *s.* 11, made it felony to assault any person in the public streets, &c., with intent to cut, &c., and cutting the clothes of such person: upon which it was holden, in a case where the defendant, intending to cut the person of the prosecutrix, struck her with a sharp instrument, and, in doing so, cut her clothes, that the primary intention must be to cut the clothes, and that as the primary intention there was the wounding of the person, the statute did not apply. *R.* v. *Williams,* 1 *Leach,* 533. So here, if it be clearly shewn that the intention was to burn the clothes, it would seem not to be within the statute; but unless the contrary be proved, the intention will be evidenced by the act; and, even should the intention be negatived, the defendant may be convicted of the assault. *See* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253).

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ASSAULTS ON OFFICERS, &C., SAVING WRECK.

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*Statute.*

9 *G.* 4, *c.* 31, *s.* 24]—Enacts, that if any person shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award.

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*Indictment for assaulting a Magistrate, &c., on account of the Exercis of his Duty in preserving Wreck.*

Sussex, to wit:—The jurors for our lady the Queen upon their oath present, that, before and at the time of the committing of the offence hereinafter mentioned, on the third day of August, in the

ninth year of the reign of our sovereign lady Victoria, at the parish of B., in the county of S., one J. N., then and there being a magistrate, (" *magistrate, officer, or other person whatsoever lawfully authorized* "), was then and there engaged in the exercise of his duty as such magistrate, in and concerning the preservation of a certain vessel, (" *of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water* "), then and there wrecked, stranded, and cast on shore, the said J. N. being then and there lawfully authorized thereunto; and that J. S., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the premises, in and upon the said J. N. then and there unlawfully did make an assault, and him the said J. N. then and there unlawfully did strike and wound, (" *strike or wound* "), on account of the exercise of the said duty of him the said J. N. in and concerning the preservation of the said vessel so wrecked, stranded, and cast on shore as aforesaid; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, transportation for seven years, or imprisonment, with or without hard labour, for such term as the court shall award. 9 G. 4, c. 31, s. 24.*

*Evidence.*

Prove that J. N. was a magistrate, &c., as stated in the indictment; (*see ante, p.* 124); that a vessel was wrecked, &c.; that J. N. was engaged endeavouring to preserve the vessel; that J. S. struck [and wounded] him as stated; and that he did so on account of his doing his duty in the preservation of the vessel. This may be proved by the declarations or acts of the defendant, or by circumstances from which his motive may be inferred.

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## IMPEDING PERSONS ENDEAVOURING TO ESCAPE FROM WRECKS.

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*Statute.*

7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 7]—Enacts, that whosoever shall by force prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress, wrecked, stranded, or cast on shore, (whether he shall be on board or shall have quitted the same), shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

*Indictment.*

Sussex, to wit:—The jurors for our lady the Queen upon their oath present, that, before and at the time of the committing the felony hereinafter mentioned, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of B., in the county of S., a certain vessel (" *ship or vessel* ") was

then and there stranded and cast on shore ("*in distress, or wrecked, stranded, or cast on shore*"), and that J. S., late of the parish aforesaid, in the county aforesaid, labourer, with force and arms, at the parish aforesaid, in the county aforesaid, one J. N., then and there endeavouring to save his life from the said ship so stranded and cast ashore, then and there feloniously and by force did prevent and impede ("*prevent or impede*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life or for not less than fifteen years, or imprisonment not exceeding three years, 7 W. 4 & 1 Vict. c. 89, s. 7, with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s. 12, (ante, p. 312).*

*This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1, (ante, p. 69).*

### *Evidence.*

Prove that the vessel was stranded and cast on shore, as stated in the indictment; prove that J. N. was endeavouring to save his life after the ship was stranded;—it is immaterial whether he was on board, or had quitted the vessel. 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 7. And prove that the defendant "by force" impeded and prevented him from so doing. *See* 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253).

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## ASSAULTS TO COMMIT FELONY, &c.

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### *Statute.*

9 *G.* 4, *c.* 31, *s.* 25]—Enacts, that where any person shall be charged with and convicted of any of the following offences, as misdemeanors; that is to say, of any assault with intent to commit felony; of any assault upon any peace officer or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages: in any such case, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace.

### *Indictment.*

*Commencement as ante, p.* 441]—in the county aforesaid, in and upon one J. N., in the peace of God and of our lady the Queen then and there being, unlawfully did make an assault, and him the said J. N., then and there did beat, wound, and ill treat, with intent [*here state the felony intended thus*: him the said J. N. then and there

feloniously, wilfully, and of his malice aforethought, to kill and murder], and other wrongs to the said J. N. then and there did, to the great damage of the said J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count for common assault, as ante, p.* 441.

*Misdemeanor, imprisonment, with or without hard labour, not exceeding two years; a fine may also be imposed, if the court shall think fit, and the defendant may be required to find sureties to keep the peace.* 9 *G.* 4, *c.* 31, *s.* 25.

*Evidence.*

Every attempt to commit a felony against the person of an individual without his consent involves an assault. Prove an attempt to commit such a felony, and prove it to have been done under such circumstances, that, had the attempt succeeded, the defendant might have been convicted of the felony. If you fail in proving the intent, but prove the assault, the defendant may be convicted of the common assault.

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*Indictment for assaulting Peace or Revenue Officers, &c., in the Execution of their Duty.*

*Commencement as ante, p.* 441]—in the county aforesaid, in and upon one J. N., then and there being a peace officer, to wit, a constable, ("*any peace officer, or revenue officer, or any person acting in aid of such officer*"), and then and there being in the due execution of his duty as such constable, did make an assault, and him the said J. N., so being in the execution of his duty as aforesaid, then and there did beat, wound, and ill treat, and other wrongs to the said J. N. then and there did, to the great damage of the said J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count for a common assault, as ante, p.* 441.

*Misdemeanor.* 9 *G.* 4, *c.* 31, *s.* 25. *See the last precedent. As to assaulting special constables, see* 1 *&* 2 *W.* 4, *c.* 41, *s.* 11, *and Reg.* v. *Porter,* 9 *C. & P.* 778.

*Evidence.*

Prove that J. N. was a peace officer, &c., as stated in the indictment, by shewing that he had acted as such; (*see ante, p.* 124); or, if the indictment be for assaulting J. N., acting in aid of an officer, prove that the officer acted as such, and that J. N. was acting in his aid. Prove that J. N. was in the due execution of his duty, and prove the assault as directed *ante, p.* 442 *et seq.*

As to the appointment and duties of parish constables, see now the stat. 5 *&* 6 *Vict. c.* 109.

Refusing to aid and assist a constable in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law. In order to support such indictment, it must be proved, that the constable saw a breach of the peace committed; that there was a reasonable necessity for calling upon the defendant for his assistance; and that when duly called on to do so, the defendant, with-

out any physical impossibility or lawful excuse, refused to do so. And it is no defence that the single aid of the defendant could have been of no avail. *Reg.* v. *Brown, C. & Mar.* 314.

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*Indictment for an Assault to prevent Arrest.*

*Commencement as ante, p.* 441]—in the county aforesaid, in and upon one J. N., in the peace of God and our lady the Queen then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill treat, with intent, in so doing, to resist and prevent ("*resist or prevent*"), the lawful apprehension ("*apprehension or detainer*") of him the said J. S. ("*the party so assaulting, or of any other person*") for a certain offence for which he the said J. S. was then and there liable to be apprehended ("*apprehended or detained*") by the said J. N.; that is to say, for [*state the offence generally*]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count for a common assault, as ante, p.* 441.

*Misdemeanor.* 9 *G.* 4, *c.* 31, *s.* 25, (*ante, p.* 458). *See the precedent, ante, p.* 458.

*Evidence.*

Prove the assault as directed *ante, p.* 442 *et seq.;* and the intent, as directed *ante, p.* 104. It must be stated and proved that the apprehension was lawful. (*See ante, p.* 423). If you fail in proving the intent, the defendant may be convicted of the common assault.

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*Indictment for an Assault in pursuance of a Conspiracy to raise Wages.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer; J. W., late of the same place, labourer; and E. W., late of the same place, labourer; on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, did amongst themselves conspire, combine, confederate, and agree together to raise the rate of wages then usually paid to workmen and labourers in the art, mystery, and business of cotton-spinners; and that the said J. S., J. W., and E. W., in pursuance of the said conspiracy, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and our lady the Queen then and there being, then and there did make an assault, and him the said J. N. then and there did beat, wound, and ill treat, and other wrongs to the said J. N. then and there did, to the great damage of the said J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count stating that the defendant assaulted* J. N., "in pursuance of a certain conspiracy before then entered into by the said J. S., J. W., and E. W., to raise the rate of wages of workmen and labourers in the art, mystery, and business of cotton-spinners. *Add a count for the common assault, as ante, p.* 441.

*Misdemeanor.* 9 *G.* 4, *c.* 31, *s.* 25, (*ante, p.* 458). *See the precedent, ante, p.* 458.

*Evidence.*

Prove the conspiracy as stated in the indictment; *see post, Book II, Part III;* and the assault, as directed *ante, p.* 442 *et seq.* Prove, also, that the assault was in pursuance of this conspiracy. If this proof fails, the defendants may be convicted of the common assault.

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FORCING SEAMEN ON SHORE.

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*Statute.*

9 *G.* 4, *c.* 31, *s.* 30]—Enacts, that if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his Majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him as are in a condition to return, when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such term as the court shall award; and all such offences may be prosecuted by indictment or by information, at the suit of his Majesty's Attorney-General, in the Court of King's Bench, and may be alleged in the indictment or information to have been committed at Westminster, in the county of Middlesex; and the said court is hereby authorized to issue one or more commissions, if necessary, for the examination of witnesses abroad; and the depositions taken under the same shall be received in evidence on the trial of every such indictment or information.

5 & 6 *W.* 4, *c.* 19, *s.* 40]—*Recites, that great mischiefs have arisen from masters of merchant ships leaving seamen in foreign parts, who have thus been reduced to distress, and thereby tempted to become pirates, or otherwise misconduct themselves, and it is expedient to amend and enlarge the law in this behalf;* and enacts, that if any master of a ship belonging to any subject of the United Kingdom shall force on shore and leave behind, or shall otherwise wilfully and wrongfully leave behind on shore or at sea, in any place in or out of his Majesty's dominions, any person belonging to his crew, before the return to or arrival of such ship in the United Kingdom, or before the completion of the voyage or voyages for which such person shall have been so engaged, whether such person shall have formed part of the original crew or not, every person so offending shall be deemed guilty of a misdemeanor, and shall suffer such punishment by fine or imprisonment, or both, as to the court before which he shall be convicted shall seem meet; and the said offence may be prosecuted by information at the suit of the Attorney-General on behalf of his Majesty, or by indictment or other proceeding in any court having criminal jurisdiction in his Majesty's dominions at home or abroad, where such master or other person as aforesaid shall happen to be,

although the place where the offence may be therein averred to have been committed (which averment is hereby required to be substantially according to the fact) shall appear to be out of the ordinary local jurisdiction of such court; and such court is hereby authorized to issue a commission or commissions for the examination of any witnesses who may be absent or out of the jurisdiction of the court; and at the trial the depositions taken under such commission or commissions, if such witnesses shall be then absent, shall be received in evidence.

Sect. 42]—Enacts, that no such master shall be at liberty to leave behind at any place abroad, either on shore or at sea, any person of his crew as aforesaid, on the plea of such person not being in a condition to proceed on the voyage, or having deserted from the ship, or otherwise disappeared, unless upon a previous certificate in writing of one of such functionaries or merchants as aforesaid, [" the governor, lieutenant-governor, secretary, or other officer appointed in that behalf by the government, at any of his Majesty's colonies or plantations, or, in the absence of all such authorities at or near to the port or place at which the ship shall be then lying, then of the chief officer of customs of such colony or plantation resident at or near to such port or place: or, at any other place abroad, of his Majesty's minister, consul, or vice-consul there, or, in the absence of any such functionary, then of two respectable merchants resident there;" *s.* 41], if there be any such at or within a reasonable distance from the place where the ship shall then be, if there be time to procure the same, certifying that such person is not in such condition, or has deserted or disappeared, and cannot be brought back; and all such functionaries as aforesaid are hereby authorized and required, on the application of any such master, to inquire by examination on oath into the circumstances, and to give or refuse such certificate according to the result of such examination.

Sect. 43—*Proof of Certificate to be on Master*]—Enacts, that if any such master shall leave behind any one of his crew as aforesaid contrary to this act, in any indictment or proceeding, the proof of his having obtained such sanction or certificate as aforesaid shall be upon him; it being the intention hereof, that, except in the case of entering into his Majesty's naval service, no person of the crew shall be discharged, either with or without his consent, in any place abroad where such functionary can be found, unless he shall have given such sanction thereto.

### *Indictment for forcing on Shore and leaving behind a Seaman.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of Westminster, in the said county, mariner, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, then being master of a certain ship called the Rattler, belonging to a certain subject of the United Kingdom of great Britain and Ireland, that is to say, to one A. B. ("*any master of a ship belonging to any subject of the United Kingdom*"), unlawfully, wilfully, and wrongfully did force on shore and leave behind at a certain place out of her Majesty's dominions, that is to say, at

New York, in the United States of America, one J. N., the said J. N. then and there being a person belonging to the crew of him the said J. S. as such master of the said ship as aforesaid, the voyage of the said ship for which he the said J. N. had been engaged not being then completed; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. now is at Westminster aforesaid, in the said county of Middlesex. *The allegation of the ownership of the ship is a material allegation, and must be proved as laid. Reg.* v. *Dunnett*, 1 *C. & K.* 425.

*Misdemeanor, fine or imprisonment, or both, in the discretion of the court.* 5 & 6 *W.* 4, *c.* 19, *s.* 40. *The offence may be prosecuted by information at the suit of the Attorney-General, or by indictment in any court having criminal jurisdiction in her Majesty's dominions at home or abroad, where the master or seaman shall happen to be, although the place where the offence is averred to have been committed, which averment is required to be substantially according to the fact, shall appear to be out of the ordinary local jurisdiction of the court. Id. For the examination of witnesses abroad, see the statute. The* 9 *G.* 4, *c.* 31, *s.* 30, *is not expresslyrepealed by this act.*

*Evidence.*

Prove that the defendant was or acted as master of the vessel, and that it was, at the time of the commission of the offence, the property of A. B.; *see Reg.* v. *Dunnett*, 1 *C. & K.* 425; prove that J. N. was then one of the crew, (it is immaterial whether he was one of the *original* crew of the ship or not); that the voyage for which he was engaged was not then completed; and that the defendant forced him on shore and left him behind at the place mentioned in the indictment.

If the defendant be proved to have wilfully left the prosecutor behind, the only defence he can set up is the production of a certificate obtained under *s.* 42, or the impossibility of obtaining such certificate under the circumstances therein mentioned. *Reg.* v. *Dunnett, supra.*

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## ASSAULTING DEERKEEPERS.

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*Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 29]—Enacts, that if any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun, fire-arms, snare, or engine in his possession, and every dog there brought for hunting, coursing, or killing deer; and in case such offender shall not immediately deliver up the same, to seize and take the same from him in any of those respective places, or, upon pursuit made, in any

other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

### *Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, into certain inclosed land in the occupation of J. W. there situate, wherein deer had been and then were usually kept, ("*forest, chase, purlieu, whether inclosed or not, or any inclosed land, where deer shall be usually kept*"), unlawfully did enter, with intent then and there unlawfully and feloniously* to hunt, kill, and carry away deer, ("*hunt, course, wound, kill, snare, or carry away any deer*"); and that J. N., ("*every person intrusted with the care of such deer, or any of his assistants, whether in his presence or not*"), then being a person intrusted with the care of the deer in the said inclosed land then and there being, then and there, after the said J. S. had so entered into the said inclosed land as aforesaid, did demand of and from the said J. S. a certain gun, ("*gun, fire-arms, snare, engine, or any dog there brought for hunting, coursing, or killing deer*"), which he the said J. S. then and there had, and did then and there, the said J. S. failing to deliver up the said gun, and altogether refusing so to do, attempt to seize and take the said gun for the use of the owner of the said deer, as he lawfully might for the cause aforesaid; and that the said J. S. then and there, with force and arms, in and upon the said J. N., then and there being a person intrusted with the care of the deer within the said inclosed lands as aforesaid, and then and there being in the due execution of his duty as aforesaid, and of the powers given to him in that behalf by the statute in that case made and provided, unlawfully and feloniously did make an assault, and him the said J. N. unlawfully and feloniously did beat and wound ("*beat or wound*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*).—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said J. N., he the said J. N. then and there being a person intrusted with the care of deer in certain inclosed lands of J. W., there situate, wherein deer had been and then were usually kept, and then and there being in the due execution of the powers given in that behalf by a certain act of Parliament made and passed in the session of Parliament holden in the 7th & 8th years of his late Majesty King George the Fourth, intituled "An act for consolidating and amending the laws in England relative to larceny and offences connected therewith," unlawfully and feloniously did make

an assault, and him the said J. N. then and there unlawfully and feloniously did beat and wound; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

* *If the defendant entered into a forest, chase, or purlieu not inclosed, omit the word* feloniously.

*Felony, punishable as simple larceny.* (*See ante, p.* 168). 7 *&* 8 *G.* 4, *c.* 29, *s.* 29.

*Evidence.*

Prove that the defendant entered into the inclosed land, &c., described in the indictment; prove the intent stated in the indictment from circumstances from which the jury may imply it; (*see ante, p.* 104); as, that the defendant actually wounded the deer, or had in his possession snares, &c., to take deer; prove that J. N. was intrusted to take care of the deer; prove that J. N. demanded the gun, and attempted to seize it; and prove the battery or wounding by the defendant, as stated in the indictment. The act done by the deer-keeper, upon which the battery ensued, must be in the due exercise of the powers given to him by the act. *R.* v. *Amery, R. & R.* 500.

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ASSAULTING GAMEKEEPERS.

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*Statute.*

9 *G.* 4, *c.* 69, *s.* 2]—Enacts, that where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, (*s.* 1, *post, Ch. V, Sect.* 6), it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase therein, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

7 *&* 8 *Vict. c.* 29, *s.* 1. (*Post, Ch. V, Sect.* 6).

*Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, about the hour of ten on the night of the same day, at the parish aforesaid, in the county aforesaid, by night did unlawfully enter certain inclosed land ("*any land*"), [in the occupation] of one J. W., there situate, and was by night then and there unlawfully in the said land, with a certain gun, for the purpose then and there of taking and destroying game; and that the said J. S. was then and there in the said land, by night, as aforesaid, he the said J. S. then and there being in the said land with the said gun for the purpose aforesaid, by one J. N., ("*the owner or occupier of such land, or any person having a right or reputed right of free warren or free chase thereon, or the lord of the manor or reputed manor wherein such land may be situate, or any gamekeeper or servant of the persons herein mentioned, or any person assisting such gamekeeper or servant*"), the servant of the said J. W., the said J. N. then and there having lawful authority to seize and apprehend the said J. S., found; and that * the said J. S., with the gun aforesaid, ("*any gun, cross-bow, fire-arms, bludgeon, stick, club, or other offensive weapon whatsoever*"), which he the said J. S., in both his hands then and there held, did then and there unlawfully assault and beat, and offer violence towards the said J. N., ("*assault or offer violence towards*"), the said J. N. then and there being lawfully authorized to seize and apprehend the said J. S.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

* *If the defendant escaped from the land and was pursued, here add,* "the said J. S. then and there from the said land did escape into a certain close there situate, and the said J. N. did then and there pursue the said J. S. into the said last-mentioned close, for the purpose of seizing and apprehending him the said J. S. as aforesaid, he the said J. N. having then and there lawful authority as aforesaid so to do, and that he the said J. N. being then and there about to seize and apprehend the said J. S. for the offence aforesaid, &c. &c." *This count may be joined with one on the 9th section, post. R.* v. *Finucane, 5 C. & P.* 551. *An indictment, which stated only that the defendant* "*was then and there, in the said land, by night as aforesaid, &c., found,*" *was held bad, as not sufficiently shewing that he was found committing the offence charged in the previous part of the indictment. Reg.* v. *Curnock,* 9 *C. & P.* 730.

*Misdemeanor, transportation for seven years, or imprisonment and hard labour for not more than two years.* 9 *G.* 4, *c.* 69, *s.* 2.

*Evidence.*

Prove that the defendant entered certain land in the parish described, belonging to or in the occupation of J. W. It is not necessary to state the name of the close; but if it be stated, it must be proved. *R.* v. *Owen,* 1 *Mood. C. C.* 118. So, a variance in the parish or other local description will be fatal. Prove that the defendant entered the land in the night-time, that is, some time between the

expiration of the first hour after sunset, and the beginning of the last hour before sunrise. 9 *G.* 4, *c.* 69, *s.* 12, *post; see R.* v. *Tomlinson,* 7 *C. & P.* 183. It is not necessary to state the hour; (*ante, p.* 38); nor, if stated, need it be proved, provided the hour proved be within the time above-mentioned. Prove that the defendant was armed with a gun, &c., and that he was on the land for the purpose of destroying game there. *See R.* v. *Barham,* 1 *Mood. C. C.* 151; *Reg.* v. *Davis,* 8 *C. & P.* 759, *post.* Prove also that the defendant was found on the land in the commission of the offence. The words of the statute are, "*found* upon any land." Upon the repealed stat. 57 *G.* 3, *c.* 90, *s.* 3, the words of which were, "enter into or be found in any forest," &c., where the defendant was not found in the close, but was seen in an adjoining close, and, shortly before he was seen, shots were heard in the close, and the jury found that he had been firing in the close, it being reserved for the judges whether it was necessary to prove that the defendant was seen in the close, where the indictment stated him to have been found; they held that, as the jury were satisfied that the defendant had been in the close armed, it was sufficient. *R.* v. *Worke,* 1 *Mood. C. C.* 165. (*See post, Part II, Ch. V, Sect. VI*). Prove that J. N. was servant of J. W., the owner or occupier of the land, (or, if the offence was committed on any public road, highway, or path, or the sides thereof, or at any gate, outlet, or opening from any land to such road, &c., the owner or occupier of land adjoining either side of that part of the road, &c. where the offender was, 7 & 8 *Vict. c.* 29, *s.* 1); and prove the assault as directed *ante, p.* 442 *et seq.* If J. N. escaped and was pursued, it must be stated, and, if stated, it must be proved. Lastly, it must be proved that the offence was committed within twelve calendar months next before the prosecution. 9 *G.* 4, *c.* 69, *s.* 4, *post.*

A gamekeeper, or other person lawfully anthorized, may apprehend poachers without giving notice of his purpose; *R.* v. *Payne,* 1 *Mood. C. C* 378; and without a written authority so to do; *R.* v. *Price,* 7 *C. & P.* 178; provided they are upon the land or manor of his master, or other place mentioned in the 7 & 8 *Vict. c.* 29; but without authority he may not apprehend them upon the lands of others. *R.* v. *Davis,* 7 *C. & P.* 785. And though sect. 2 is confined to offences mentioned in sect. 1, still an offender under sect. 9 may be apprehended; for, though a greater punishment is inflicted where several are out armed together, it is still an offence within sect. 1. *R.* v. *Ball,* 1 *Mood. C. C.* 330.



### SHOOTING AT OFFICERS OF THE CUSTOMS.



*Statute.*

8 & 9 *Vict. c.* 87, *s.* 64)—Enacts, that if any person shall maliciously shoot at any vessel or boat belonging to her Majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at, maim, or dangerously wound any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and

on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, being lawfully convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court before which he shall be convicted, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

7 *W.* 4 *&* 1 *Vict. c.* 91, *s.* 2—*Place and Mode of Imprisonment*]—Enacts, that in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, nor three months in one year, as to the court in its discretion shall seem meet.

8 *&* 9 *Vict. c.* 87, *s.* 131—*Proof of Employment*]—Enacts, that all persons employed for the prevention of smuggling under the direction of the commissioners of her Majesty's customs, or of any officer or officers in the service of the customs, shall be deemed and taken to be duly employed for the prevention of smuggling; and the averment in any information or suit that such party was so duly employed shall be sufficient proof thereof, unless the defendant in such information or suit shall prove to the contrary.

Sect.132—*Proof of Commission, and Competency of Witnesses*]—Enacts, that if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information, on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information.

*Indictment.*

*Commencement as ante, p.* 441]—in the county aforesaid, with a certain pistol then and there loaded with gunpowder and one leaden bullet, which he the said J. S. in his right hand then and there had and held, at and against one J. N., the said J. N. then and there being an officer of the customs, ("*any officer in the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling*"), and in the due exercise of his office and duty as such

officer, then and there feloniously and maliciously did shoot; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 19.

*Felony, transportation for life, or for not less than fifteen years, or imprisonment not exceeding three years,* 8 *&* 9 *Vict. c.* 87, *s.* 64, *with or without hard labour, or with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 91, *s.* 2.

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that J. N. was an officer of the customs, &c., in the due exercise of his office. Evidence of his acting as such will be sufficient, without producing his commission or appointment. 8 *&* 9 *Vict. c.* 87, *ss.* 131, 132. The statute only applies to such officers of the army, navy, or marines, as are on full pay, and employed for the prevention of smuggling. Prove that the defendant wilfully fired at J. N. If he fired wilfully, it will be sufficient evidence of his doing so maliciously.

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*Indictment for Maiming or Wounding Officers of the Customs.*

*Commencement as ante, p.* 441]—in the county aforesaid, one J. N., in and upon the right side of the belly, between the short ribs of him the said J. N., the said J. N. then and there being an officer of the customs, [*see the last precedent*], and in the due exercise of his office and duty as such officer, then and there feloniously and maliciously did dangerously wound ("*maim or dangerously wound*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 19.

*Felony.* 8 *&* 9 *Vict. c.* 87, *s.* 64. *See the last precedent.*

*Evidence.*

This is proved in the same manner as the last case, except that, instead of proving the shooting, it must be proved that the defendant dangerously wounded ("*or maimed*") J. N.

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ASSAULTING AND OBSTRUCTING OFFICERS OF CUSTOMS.

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*Statute.*

8 *&* 9 *Vict. c.* 87, *s.* 66]—Enacts, that if any person shall by force or violence assault, resist, oppose, molest, hinder, or obstruct any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution

of his or their office or duty, such person, being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned in any house of correction or common gaol, and kept to hard labour for any term not exceeding three years, at the discretion of the court before whom the offender shall be tried and convicted as aforesaid.

*Indictment.*

*Commencement as ante, p.* 441]—in the county aforesaid, unlawfully did, by force and violence, assault and resist ("*assault, resist, oppose, molest, hinder, obstruct*") one J. N., the said J. N. then and there being an officer of the customs, ("*see the last precedent but one*), and in the due exercise of his office and duty as such officer; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 19.

*Misdemeanor, transportation for seven years, or imprisonment with hard labour not exceeding three years.* 8 & 9 *Vict. c.* 87, *s.* 6.

*Evidence.*

Prove that the defendant, with force and violence, assaulted and resisted J. N. And prove the other allegations in the indictment in the same manner as in the two last cases.

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SECT. 4.

FALSE IMPRISONMENT.

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*Indictment for an Assault and False Imprisonment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and of our lady the Queen, then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill treat, and him the said J. N. then and there unlawfully and injuriously, and against the will of the said J. N., and also against the laws of this realm, and without any legal warrant, authority, or reasonable or justifiable cause whatsoever, did imprison, and detain so imprisoned there for a long space of time, to wit, for the space of ten hours then next following*, and other wrongs to the said J. N. then and there did, to the great damage of the said J. N., and ag inst the peace of our lady the Queen, her crown and dignity. *If any money were extorted from the prosecutor for setting him at liberty, add an averment of it immediately after the above asterisk, as thus:* then next following, and until he the said J. N. had paid to the said J. S. the sum of five pounds and five shillings, of the monies of the said J. N. for his enlargement; and other wrongs, &c. *as above. Add a count for a common assault, as ante, p.* 441.

***Misdemeanor at common law, punishable with fine or imprisonment, or both.***

*Evidence for the Prosecution.*

All the prosecutor has to prove is the imprisonment; it is for the defendant to shew that he was justified in what he did, and that the imprisonment was lawful.

And every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 2 *Inst.* 589; *Cro. Car.* 210; *Com. Dig.*, *Imprisonment*, (G). Where a magistrate's warrant has been shewn to a party, who goes before a magistrate at the desire of a constable, without further compulsion, this, it seems, is a sufficient imprisonment. *Chinn* v. *Morris*, 2 *C. & P.* 361: *Pocock* v. *Moore*, *Ry. & M. N. P.* 321. But where the warrant is used merely as a summons, and the party voluntarily goes before the magistrate, this, it seems, is not an imprisonment. 2 *N. R.* 211; *Ry. & M. N. P.* 26; 6 *B. & C.* 528; 9 *Dowl. & R.* 558. Where a man who had an idiot brother bed-ridden in his house kept him in a dark room without sufficient warmth or clothing, it was holden not to be an imprisonment. *R.* v. *Smith*, 2 *C. & P.* 449.

If the prosecutor fail in proving the imprisonment, he may proceed to prove the second count for the assault and battery, as directed *ante, p.* 442 *et seq.*

*Evidence for the Defendant.*

The defendant must either prove that he did not imprison J. N. at all, or he must justify the imprisonment. The grounds upon which an imprisonment can be justified may be considered under the following heads:—

*Arrest under Civil Process.*]—An arrest under a *capias ad respondendum* issuing out of any of the superior courts, if regular and regularly executed, may be justified, not only by the officer who made it, but also by the plaintiff and his attorney, whether in fact there be a cause of action or not; for, if there be no cause of action, the party's only remedy is against the plaintiff, by action on the case for maliciously holding him to bail. *Belk* v. *Broadbent*, 3 *T. R.* 183: *Rowland* v. *Veale*, *Cowp.* 18. In order to justify under such process, however, it is essential to shew that it was returned. *Cowp.* 18; 2 *Ro. Abr.* 563, *pl.* 9, 18; *Fortesc.* 379.

An arrest for a *ca. sa.* out of a superior court, if regular and regularly executed, may be justified by the officer who executed it, whether there be a judgment to warrant it or not; 1 *Lev.* 95; 3 *Lev.* 20; 1 *Salk*, 409; but if the plaintiff or his attorney would justify under it, he must shew such a judgment as would warrant it; *per Holt*, C. J., *Carth.* 443; *Barker* v. *Braham*, 3 *Wils.* 368; 2 *W. Bl.* 866; and therefore, where a *ca. sa.* was sued out on a judgment against an administratrix, without suggesting a *devastavit*, it was holden, that false imprisonment would lie against the plaintiff and his attorney. *Ib.* But it is not necessary that a *ca. sa.* should be returned in order to justify under it, as is the case under mesne process. *Rowland* v. *Veale*, *Cowp.* 18.

As to process out of an inferior court, it must appear that the

court had jurisdictiction of the cause of action, 10 *Co.* 76 *a*, 68 *b*; *and see* 3 *Lev.* 141, 243; *T. Jones*, 165, and that the process was executed within the jurisdiction, 3 *Lev.* 243, in order to justify either the officer or the party.

But if the writ or warrant be void upon the face of it, as if, formerly, there were no more than one term between the teste and return of mesne process, 3 *Wils.* 341; 2 *W. Bl.* 845, or if the officer's name be inserted in the warrant after it is sealed, 2 *Wils.* 47, or if the writ be executed after the day on which it expires, 2 *Esp.* 585, or on a Sunday, 29 *C.* 2, *c.* 7, *s.* 6, it will be no justification to the person arresting under it. So, an arrest of A. B. cannot be justified under a writ against C. D., *Hardr.* 323; *Moor*, 457; 2 *Selw. N. P.* 850, even although it may be proved that A. B. was the person actually intended to be arrested, although misnamed in the writ, 8 *East*, 328; *see* 6 *T. R.* 234, unless, indeed, it be satisfactorily shewn that he was known as well by one name as the other. 8 *East*, 328. In this respect, however, there is a distinction between mesne and final process, for, in the latter case, the party is estopped by the judgment from denying the name by which he is sued. *Reeves* v. *Slater*, 7 *B. & C.* 487; 2 *Man. & Ry.* 265. But neither the officer nor the party is subject to an indictment for false imprisonment for arresting a person privileged from arrest, whether the privilege be permanent, 2 *Doug.* 671, or temporary, 2 *W. Bl.* 1190; *and see Id.* 1195.

*Arrest under Warrant.*]—A warrant from a magistrate having general cognisance of the matter of it, will justify the officer in executing it, whether there be any grounds in fact for granting it or not; *Shergold* v. *Holloway*, 2 *Str.* 1002; but, on the contrary, if the magistrate have not cognisance of the matter of the warrant, if, for instance, he granted a warrant to take up J. N. to answer in a plea of debt, the constable would not be justified in arresting him. *Id.*; *and see Com. Dig.*, *Imprisonment*, (H) 8, 9. The warrant must be executed within the proper jurisdiction; formerly, if a warrant were granted generally, it could only be executed within the district for which the constable was appointed, although it was otherwise when it was granted to a constable by name; but now, by stat. 5 *G.* 4, *c.* 14, *s.* 6, constables may execute process out of their districts, within the jurisdiction of the justice granting or backing the warrant. So, a conviction by a magistrate having competent jurisdiction over the subject-matter of it, upon which the party has been arrested, is, until reversed or quashed, conclusive evidence in favour even of the magistrate, in a prosecution against him for false imprisonment. 7 *T. R.* 633, *n.*

*Arrest without Warrant.*]—A justice of peace may apprehend, or cause to be apprehended by a verbal order merely, any person committing a felony or breach of the peace in his presence. 2 *Hale*, 86.

The sheriff or coroner also may apprehend any felon within the county, without warrant. 4 *Bl. Com.* 289.

A constable may arrest any one for a breach of the peace in his presence, and keep him in his house or the stocks until he can bring him before a magistrate. 1 *Hale*, 587: *see Cook* v. *Nethercote*, 6 *C. & P.* 741. So, a constable may justify arresting a man upon a reason-

able charge of felony, although it afterwards appear that the man is innocent, or even that no felony was in fact committed. *Samuel* v. *Payne*, *Doug.* 359: *Cowes* v. *Dunbar*, 2 *C. & P.* 565. *See R.* v. *Ford*, *R. & R.* 329: *R.* v. *Thompson*, 1 *Mood. C. C.* 80. (*See ante*, p. 423). So, where a felony has been actually committed, a constable may arrest a man upon a reasonable suspicion of his having committed it; 2 *Inst.* 52; 1 *Hale*, 90, 91, 92; *Ledwith* v. *Catchpole*, *Cold.* 291; and it has been holden, that the question of reasonable suspicion is matter of law, and should not be left to the jury. *Hill* v. *Yates*, 2 *Moor*, 80: *and see Moor* v. *Kaye*, 4 *Taunt.* 34.

A watchman or beadle may arrest and detain in custody, for examination, any person whom he finds in the streets at night, and whom there is reasonable ground to suspect of felony, although there be no proof of a felony actually committed. *Lawrence* v. *Hedger*, 3 *Taunt.* 14: *and see* 2 *Hale*, 98; 2 *Inst.* 52; 7 *G.* 4, *c.* 143, *s.* 73.

A private person, and, *à fortiori*, a peace officer, if a felony be committed, or a dangerous wound given in his presence, is not only justified in arresting, but is bound by law to arrest the felon. 2 *Hawk. c.* 12, *s.* 1. So, he is justified in restraining persons committing an affray; but he cannot arrest any person concerned in it after the affray is over, for in that case a warrant is necessary. 2 *Inst.* 52. So, he may arrest any man about to commit a felony or treason, or any act which would manifestly endanger another's life, and detain him until the intent be presumed to have ceased. 2 *Hawk. c.* 12, *s.* 19; 2 *Ro. Abr.* 559, (E); *Hancock* v. *Baker*, 2 *B. & P.* 260. So, upon a reasonable suspicion he may arrest another for felony; *R.* v. *Hunt*, 1 *Mood. C. C.* 93; but he does it at his peril; for, if the party be innocent, the person arresting is guilty of a false imprisonment. *Stonehouse* v. *Elliott*, 6 *T. R.* 315.

Persons found committing any offence against the statute 7 & 8 *G.* 4, *c.* 30, the Malicious Injuries Act, may be apprehended without warrant by any peace officer, the owner of the property, his servant, or person authorized by him. 7 & 8 *G.* 4, *c.* 30, *s.* 28: *see R.* v. *Fraser*, 1 *Mood. C. C.* 419. So, with respect to offences against the Larceny Act, 7 & 8 *G.* 4, *c.* 29, *s.* 63, and the Game Act, 9 *G.* 4, *c.* 69, *s.* 2: and by stat. 3 & 4 *W.* 4, *c.* 53, *s.* 53, persons making fires or signals to smuggling vessels may be apprehended by any person. By the Vagrant Act, 5 *G.* 4, *c.* 83, *s.* 6, persons offending against that act may be apprehended. Similar provisions are contained in many local acts, with respect to particular subjects.

*Arrest for a Contempt.*]—If a contempt be committed in the face of a court, (as, by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever), the judge may order the offender to be instantly apprehended and imprisoned, at his (the judge's) discretion, without any further proof or examination. 2 *Hawk. c.* 22; 4 *Bl. Com.* 282, 283; 1 *Taunt.* 146. *See Cropper* v. *Horton*, 8 *D. & R.* 166.

*Arrest after an Escape.*]—In civil cases, where a person in custody in execution escapes, if it be a negligent escape, the gaoler or officer may retake him; if voluntary, a retaking would be a false imprisonment. 1 *Saund.* 35, *n.*; 1 *Sid.* 330; 1 *Show.* 174; *Atkinson* v. *Jameson*,

5 *T. R.* 25. Where a person in custody upon mesne process escapes, if the escape be negligent, the gaoler or officer may retake him; if voluntary, he cannot.

In criminal cases, where a prisoner escapes, if the escape be negligent merely, the gaoler or officer may retake him, at any time, without warrant; *Dalt. c.* 169; if voluntary, he cannot afterwards be retaken by virtue of the same warrant under which he was at first arrested, 2 *Hawk. c.* 13, *s.* 9, but he may be retaken on a fresh warrant, or without warrant in cases where he might have been arrested without warrant originally.

*Arrest under other Authority.*]—Where a feme covert appeared before a justice of peace as a material witness in a case of felony, it was holden that he was justified in committing her until the sessions, upon her refusing to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennet* v. *Watson*, 3 *M. & Sel.* 1. So, a magistrate may commit for re-examination; but if the committal be for an unreasonable time, the warrant of commitment is virtually void, and the commitment is an imprisonment. *Davis* v. *Capper*, 5 *Man. & Ryl.* 53; 10 *B. & C.* 28.

Commissioners of bankrupt have, in certain cases, authority to commit. 1 & 2 *W.* 4, *c.* 56, *s.* 7. If they act beyond the limits of their authority, it amounts to an imprisonment; but, if they act within the limits of their authority, though from an erroneous or mistaken judgment, it is otherwise. *Doswell* v. *Impey*, 1 *B. & C.* 168; 2 *D. & R.* 350. They could not commit for contempt, *in re Faulkner*, 2 *C., M., & R.* 525, until the recent stat. 5 & 6 *Vict. c.* 122, *s.* 66, gave them all the powers and privileges of a court of record. *See Watson* v. *Bodell*, 14 *M. & W.* 57.

Officers in the army and navy have, in many instances, authority to imprison soldiers and seamen under their command. But false imprisonment has been holden to lie against a superior officer, where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty, and continued beyond all necessary bounds. *Wall* v. *Macnamara*, 1 *T. R.* 536, *cit.* So, where a seaman was confined by his captain for three days, for a supposed breach of duty, and was then liberated by him, without being brought to a court martial, it was holden, that false imprisonment would lie. *Swinton* v. *Molloy*, 1 *T. R.* 537, *cit.*

An arrest and detention under an impress warrant may be lawful, but the party executing it does so at his peril; for if he take a man not liable to be impressed, as, for instance, a person who has never served at sea, he is guilty of false imprisonment. *Flewster* v. *Royle*, 1 *Camp.* 187.

Where a ship is taken *bonâ fide* as prize, the necessary imprisonment of the crew, in such a case, is not to be deemed a false imprisonment, although it afterwards turn out that the ship was not liable to capture. *Le Caux* v. *Eden*, 2 *Doug.* 594.

### ARRESTING A CLERGYMAN GOING TO PERFORM DIVINE SERVICE.

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*Statute.*

9 *G.* 4, *c.* 31, *s.* 23]—Enacts, that if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award.

*Indictment.*

*Commencement as ante, p.* 441]—in the county aforesaid, unlawfully did arrest one J. N., a clergyman, upon certain civil process, whilst he the said J. N., as such clergyman as aforesaid, then and there was going to perform divine service, he the said J. S. then and there well knowing that the said J. N. was then and there a clergyman, and was so going to perform divine service as aforesaid ; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, fine or imprisonment, or both.* 9 *G.* 4, *c.* 31, *s.* 23.

*Evidence.*

Prove that J. N. is a clergyman, and that he was arrested upon civil process by the defendant, as stated in the indictment. If the charge be for arresting J. N. while going to perform, or returning from the performance of divine service, prove that the defendant knew that J. N. was so going or returning.

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## ABDUCTION.

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### OF A WOMAN ON ACCOUNT OF HER FORTUNE.

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*Statute.*

9 *G.* 4, *c.* 31, *s.* 19]—Enacts, that where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress, presumptive or next of kin, to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall

be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

### *Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, and from motives of lucre, did take away and detain ("*take away or detain*") one A. N., against her will, she the said A. N. then and there having a certain present and absolute interest ("*any interest, whether legal or equitable, present or future, absolute, conditional, or contingent*") in certain real estate, ("*real or personal estate*"), with intent her the said A. N. to marry, ("*to marry or defile, or to cause her to be married or defiled by any other person*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count stating generally the nature of some part of the property, and, if the intent be doubtful, add counts varying the intent. Formerly, if a woman was taken away forcibly in one county, and was married or defiled with her own consent, without any continuing force, in another county, the offence was not complete in either county, and the offender could not be indicted; R.* v. *Gordon,* 1 *Russ.* 707; *but now, as actual marriage or defilement is not necessary, this difficulty cannot occur.*

*Felony, transportation for life, or not less than seven years, or imprisonment, with or without hard labour, not exceeding four years.* 9 *G.* 4, *c.* 31, *s.* 19. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 9, (*ante, p.* 69).

### *Evidence.*

Prove that the defendant took away and detained A. N. against her will. If she be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, and be forcibly detained by him, the offence is within the statute. *See* 1 *Hawk. c.* 41, *s.* 7. So, it will be within the statute, if, having been forcibly taken away, she be afterwards married or defiled with her own consent; for the offender is not to escape from the provisions of the statute, by having prevailed over the weakness of a woman whom he originally got into his power by such base means. *Fulwood's case, Cro. Car.* 488; *Swenden's case,* 5 *St. Tr.* 450; 1 *Hale,* 660. And though she be taken away and married with her own consent, yet, if this be effected by means of fraud, it would seem to be a case within the statute; for she cannot, whilst under the influence of fraud, be considered to be a free agent. *R.* v. *Wakefield, Lancaster Assizes,* 1827. Prove, also, that A. N. had the interest stated in the indictment, from which the motives of lucre may be presumed. Prove the intent stated in the indictment by the declarations or acts of the defendant, or by circumstances from which the intent may be inferred. *See Reg.* v. *Barratt,* 9 *C. & P.* 387. Under the old law, the woman must have been married or defiled, but this is no longer

necessary, the intent to marry or defile being sufficient. The woman, though married, may be a witness against the offender; for, though his wife *de facto*, she is not so *de jure*. 1 *Hale*, 661; 4 *Com.* 209; *Brown's case*, *Ventr.* 243; 3 *Keb.* 193; *R.* v. *Wakefield*, *ubi supra*. And, for the same reason, she is a competent witness for him on a prosecution for this offence, though she has cohabited with him from the day of the marriage. *R.* v. *Perry*, 1 *Hawk. c.* 41, *s.* 13; 1 *Russ.* 710; 1 *East, P. C.* 454.

If the jury are not satisfied that the defendant was actuated by motives of lucre, but it be proved that he used force in taking the woman away without her consent, he may be convicted of an assault under the stat. 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253).

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OF A GIRL UNDER SIXTEEN YEARS OF AGE.

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*Statute.*

9 *G.* 4, *c.* 31, *s.* 20]—Enacts, that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court shall award.

*Indictment.*

*Commencement as in the last precedent*]—in the county aforesaid, unlawfully did take and cause to be taken one A. N. out of the possession and against the will of R. N., her father, ("*out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her*"), she the said A. N. then and there being an unmarried girl, under the age of sixteen years, to wit, of the age of fifteen years; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The allegation, "being an unmarried girl," is sufficient.* *R.* v. *Moor*, 2 *Lev.* 179: *R.* v. *Boyall*, 2 *Bur.* 832.

*Misdemeanor, fine or imprisonment, or both.* 9 *G.* 4, *c.* 31, *s.* 20.

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 35, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant took A. N. out of the charge of her father, or of some person having the lawful care or charge of her. It is an offence within this statute to take away a natural daughter under sixteen from the custody of her putative father. 1 *Hawk. c.* 11, *s.* 14; *R.* v. *Cornfield*, 2 *Str.* 1162: *R.* v. *Sweeting*, 1 *East, P. C.* 457. Upon the death of the father, the mother retains her authority, though she marry again, unless the father has disposed of the custody of his child to others; the assent of the second hus-

band is not material. *Ratcliffe's case*, 3 *Co.* 39. Prove also that she was taken away against the will of the person who had the care or charge of her. If the defendant induce the parents, by false and fraudulent representations, to allow him to take the child away, this is an abduction within the statute. *Reg.* v. *Hopkins*, *C. & Mar.* 254. It seems to be doubtful whether, if the parent once consent, but afterwards dissent, a subsequent taking away can be said to be against the will of the parent. *Calthorpe* v. *Astell*, 3 *Mod.* 169; 1 *East, P. C.* 457. And it is not clear from the statute whether it would be an offence to take away a girl against the consent of her parent, but by the consent of one who has the temporary care of her. 1 *East, P. C.* 457. Prove that she was under the age of sixteen years, and unmarried. It is no defence that the defendant did not know her to be under sixteen, or might suppose from her appearance that she was older. *Reg.* v. *Robins*, 1 *C. & K.* 451. If she was under the age of ten years, and taken away by force or fraud, the defendant must be indicted as in the next precedent.

The act is positively prohibited, and therefore the absence of a corrupt motive is no answer to the charge. So, it was held to be no legal excuse that the defendant made use of no other means than the common blandishments of a lover, to induce her to elope with and marry him. *R.* v. *Twistleton*, 1 *Lev.* 257; 1 *Sid.* 387; 2 *Keb.* 32; 1 *Hawk. c.* 44, *s.* 10. Under this statute, however, a mere fraudulent decoying or enticing away of the girl, if she goes voluntarily, has been held not to be punishable. *Reg.* v. *Meadows*, 1 *C. & K.* 399. But where the defendant went in the night to her father's house, and placed a ladder against her window, and held it for her to descend, which she did, and eloped with him, this was held to be a "taking of her out of the possession of her father" within the statute; although she had herself proposed the plan to the defendant. *Reg.* v. *Robins*, *Id.* 456.

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## STEALING CHILDREN UNDER THE AGE OF TEN YEARS.

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### *Statute.*

9 *G.* 4, *c.* 31, *s.* 21]—Enacts, that if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house

of correction, for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment: Provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof.

### *Indictment.*

*Commencement as ante, p.* 476]—in the county aforesaid, feloniously and maliciously did, by force, ("*force or fraud*"), lead and take away ("*lead or take away, or decoy or entice away, or detain*") one A. N., a child then under the age of ten years, to wit, of the age of seven years, with intent then and there and thereby to deprive one J. N., the father ("*parent or parents, or any other person having the lawful care or charge of such child*") of such child, of the possession of the said child; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously and maliciously did, by force, lead and take away the said J. N., a child then under the age of ten years, to wit, of the age of seven years, with intent then and there and thereby, divers articles, ("*any article upon or about the said child, to whomsoever such article may belong*"), that is to say, one necklace of the value of twenty shillings, [*&c. stating the articles*], then and there upon and about the person of the said child, feloniously to steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts stating that the defendant did* "by fraud entice away," *or*, "did by fraud detain," *or*, "did by force detain," *&c., if necessary.*

*Felony, transportation for seven years, or imprisonment with or without hard labour, not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 9 *G.* 4, *c.* 31, *s.* 21.

### *Evidence.*

Prove that the defendant took and enticed the child away; that the child was under the age of ten years; and prove the intent from circumstances from which the jury may infer it. Proof that J. N. was the father of the child will prove the intent stated in the first count, because the natural consequence of taking the child must be to deprive the father of its possession. The defendant may prove that he claimed to be the putative father, or to have a right to the possession of the child; for such persons are specially exempted from the operation of this section of the act. 9 *G.* 4, *c.* 31, *s.* 21.

## SECT. 6.

### RAPE.

### RAVISHING WOMEN.

*Statute.*

9 *G.* 4, *c.* 31, *s.* 16]—Enacts, that every person convicted of the crime of rape shall suffer death as a felon.

Sect. 18]—Whereas, upon trials for the crimes of buggery and of rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, (*s.* 17, *post*, *p.* 483), offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes; for remedy thereof be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only.

4 *&* 5 *Vict. c.* 56, *s.* 3—*Commutation of Punishment*]—*Recites the* 9 *G.* 4, *c.* 31, *ss.* 16 *&* 17, *and enacts,* that from and after the commencement of this act, [1st Oct. 1841], if any person shall be convicted of any of the said offences hereinbefore last specified, such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said act hereinbefore last recited, ordered to be given or awarded against persons convicted of the said last-mentioned offences, or any of them respectively, be liable to be transported beyond the seas for the term of his natural life.

*Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one A. N., in the peace of God and our lady the Queen then and there being, violently and feloniously did make an assault, and her the said A. N. then and there violently and against her will feloniously did ravish and carnally know; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *An indictment is good which charges that A. committed a rape, and that B. was present aiding and abetting him in the commission of the felony; for the party aiding may be charged either, as he was in law, a principal in the first degree, or as he was in fact, a principal in the second degree. Reg.* v. *Crisham, C. & Mar.* 187. *A general conviction of a defendant, charged both as prin-*

*cipal in the first degree and as an aider and abettor of other men in rape, is valid on the count charging him as principal. And on such an indictment, evidence may be given of several rapes on the same woman, at the same time, by the defendant and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed.* *R.* v. *Folkes,* 1 *Mood. C. C.* 344: *R.* v. *Gray,* 7 *C. & P.* 164.

*An indictment charging that the defendant in and upon A. B., "feloniously and violently did make [omitting the words "an assault"], and her the said A. B. then and there, against her will, violently and feloniously did ravish and carnally know," &c., was held sufficient in arrest of judgment.* *Reg.* v. *Allen,* 2 *Mood. C. C.* 179; 9 *C. & P.* 521. *The omission of the "carnaliter cognovit" makes the indictment bad on demurrer, but, as it seems, not after verdict.* *R.* v. *Warren,* 1 *Russ.* 686.

*Felony, transportation for life.* 4 *&* 5 *Vict. c.* 56, *s.* 3. *This offence is not triable at any quarter sessions. Id. s.* 6; *see also* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

## *Evidence.*

*That J. S.*]—If it be proved that the defendant is under the age of fourteen years, he must be acquitted, whatever may be the nature of the evidence against him; for a boy under the age of fourteen years is presumed by law incapable to commit a rape; 1 *Hale,* 631; and this presumption is not affected by the statute 9 *G.* 4, *c.* 31, *s.* 18. *R.* v. *Groombridge,* 7 *C. & P.* 582. Nor is evidence admissible against him, to shew that in fact he has attained the full state of puberty, and was capable of committing the crime. *Reg.* v. *Philips,* 8 *C. & P.* 736: *Reg.* v. *Jordan,* 9 *C. & P.* 118. But he may on this indictment be convicted of an assault, under stat. 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253), and have sentence of imprisonment with hard labour. *Reg.* v. *Brimilow,* 2 *Mood. C. C.* 122; 9 *C. & P.* 366. A husband, also, cannot be guilty of a rape upon his wife. 1 *Hale,* 629. But in both cases they may be principals in the second degree, and punished for being present aiding and abetting. *Id.* 629, 630. *See R.* v. *Eldershaw,* 3 *C. & P.* 396, (*ante, p.* 11).

*The said A. N. violently and against her will.*]—It must be proved that the rape was committed on A. N. against her will; and which of course implies violence. If, however, she yielded through fear of death or duress, it is rape. 1 *Hawk.* 41, *s.* 6. Or if the connexion took place when she was in a state of insensibility from liquor, having been made drunk by the prisoner, (though the liquor was given only for the purpose of exciting her), it is a rape. *Reg.* v. *Camplin,* 1 *C. & K.* 746. And it is no excuse that she consented at first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact. *Id. s.* 7. Even that the woman was a common strumpet, or the concubine of the ravisher, is no excuse; 1 *Hale,* 729; although such circumstances should certainly operate with the jury as to the probability of the fact that connexion was had with the woman against her consent.

Having carnal knowledge of a woman, under circumstances which induce her to suppose it is her husband, was held by a majority of the judges not to amount to a rape; but several of the majority intimated, that, should the point again occur, they would direct the jury to find a special verdict. *R.* v. *Jackson, R. & R.* 487. In *Reg.*

v. *Saunders*, 8 *C. & P.* 265, and *Reg.* v. *Williams, Id.* 286, where the defendants were indicted for rapes under similar circumstances, *Gurney* and *Alderson*, Bs., directed an acquittal for the rape, but held that the defendants might be convicted of the assault under the stat. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253); and the judges afterwards held, that, upon such conviction, hard labour might be added to the sentence of imprisonment. *See Reg.* v. *Stanton*, 1 *C. & K.* 415.

The party ravished is a competent witness to prove this and every other part of the case, but the credibility of her testimony, and how far she is to be believed, must be left to the jury, upon the circumstances of fact that concur in her testimony. For instance, if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other hand, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption, that her testimony is false or feigned. 4 *Bl. Com.* 213. And the defendant may give evidence of the woman's notoriously bad character for want of chastity or common decency; or that she had before been connected with the prisoner himself; but he cannot give evidence of any other particular facts to impeach her chastity. *R.* v. *Hodgson, R. & R.* 211; *R.* v. *Clarke*, 2 *Stark.* 243; *R.* v. *Barker*, 3 *C. & P.* 589; *R.* v. *Martin*, 6 *C. & P.* 562. But if, on cross-examination, she deny having had intercourse with other men than the prisoner, those men may be called to contradict her. *Reg.* v. *Robins*, 2 *M. & Rob.* 512. So, what she herself said so recently after the fact as to preclude the possibility of her being practised on, has been holden to be admissible in evidence as a part of the transaction; but the particulars of her complaint are not evidence of the truth of her statement; *R.* v. *Brazier*, 1 *East, P. C.* 444; *R.* v. *Clarke*, 2 *Stark.* 241; *Reg.* v. *Megson*, 9 *C. & P.* 420; *Reg.* v. *Guttridge, Id.* 471; and cannot be asked in her examination in chief or proved by other testimony: and though she may be asked whether she named a person as having committed the offence, it has been ruled she cannot be asked whose name was mentioned. *Reg.* v. *Osborne, C. & Mar.* 622. But the soundness of this rule has been questioned. *See Reg.* v. *Walker*, 2 *M. & Rob.* 212.

*Did ravish and carnally know.*]—To constitute the offence of rape, there must be a penetration. *R.* v. *Hill*, 1 *East, P. C.* 439.

Any, the slightest, penetration will be sufficient; where a penetration was proved, but not of such a depth as to injure the hymen, still it was holden to be sufficient to constitute the crime of rape. *R.* v. *Russen*, 1 *East, P. C.* 438, 439; *see Reg.* v. *M'Rue*, 8 *C. & P.* 541. In a recent case, however, where it appeared that the hymen was not ruptured, *Gurney*, B., ruled that the penetration was not sufficient to constitute the offence. *R.* v. *Gammon*, 5 *C. & P.* 321; but that case has since been expressly overruled. *Reg.* v. *Hughes*, 2

*Mood. C. C.* 190; 9 *C. & P.* 752: *see also Reg.* v. *Lines*, 1 *C. & K.* 393.

Before the recent statute, it was also necessary to prove emission, which might be proved either positively, by the evidence of the woman that she felt it; or it might be presumed from circumstances, as, for instance, that the defendant, after having connexion with the prosecutrix, arose from her voluntarily, without being interrupted in the act. *R.* v. *Harmwood*, 1 *East, P. C.* 440: *R.* v. *Sheridan*, 1 *East, P. C.* 438: *R.* v. *Burrows*, *R. & R.* 519. But it is not now necessary to prove the actual emission of seed, in order to constitute a carnal knowledge; but the carnal knowledge shall be deemed complete upon proof of penetration only. 9 *G.* 4, *c.* 31, *s.* 18. And even though the jury negative the emission, or the circumstances be proved to have been such as that no emission did or could take place, the offence is complete if the penetration be proved. *R.* v. *Cox*, 1 *Mood. C. C.* 337; 5 *C. & P.* 297: *R.* v. *Reckspear*, 1 *Mood. C. C.* 342: *Reg.* v. *Allen*, 9 *C. & P.* 31.

If the evidence is defective in not making out the penetration, &c., the defendant may be convicted of the assault. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253; *see p.* 258).

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## RAVISHING CHILDREN.

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### *Statutes.*

9 *G.* 4, *c.* 31, *s.* 17]—Enacts, that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten years, and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award.

4 & 5 *Vict. c.* 56, *s.* 3.]—(*Ante, p.* 480).

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### *Indictment for carnally abusing a Child under Ten Years.*

*Commencement as in the last precedent*]—in and upon one A. N., an infant under the age of ten years, to wit, of the age of nine years, in the peace of God and our lady the Queen then and there being, feloniously did make an assault, and her the said A. N. then and there feloniously did unlawfully and carnally know and abuse; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life.* 4 & 5 *Vict. c.* 16, *s.* 3. *This offence is not triable at any quarter sessions. Id. s.* 6: *see also* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

The evidence is the same as in rape, with this exception, that it is immaterial whether the act was done with or without the consent of the female. The child may be a witness, if she appear sufficiently to understand the nature and moral obligation of an oath. (*See ante, p.* 143). She must be proved to be under ten years of age, Where the offence was committed on the 5th of February, 1832, and the child's father proved that on his return home, after an absence of a few days, on the ninth of February, 1822, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism shewed that the child had been baptized on the 9th of February, 1822; this evidence was holden not sufficient to prove the age of the child. *R.* v. *Wedge*, 5 *C. & P.* 298. The defendant cannot, on an indictment for this offence, (consent appearing on the part of the girl), be convicted of an assault under the 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 11, (*ante, p.*253). *Reg.* v. *Banks*, 8 *C. & P.* 574; *see Reg.* v. *Meredith, Id.* 589, (*ante, p.* 442); *Reg.* v. *Day*, 9 *C. & P.* 722. *Sed quære*; *see Reg.* v. *Folkes*, 2 *M. & Rob.* 460. It does not appear from the report whether, in that case, consent was shewn or not.

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*Indictment for carnally knowing and abusing a Child above Ten and under Twelve Years.*

*Commencement as ante, p.* 480]—in and upon one A. N., an infant above the age of ten years, and under the age of twelve years, to wit, of the age of eleven years, in the peace of God and our lady the Queen then and there being, unlawfully did make an assault, and her the said A. N. then and there did unlawfully and carnally know and abuse; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, imprisonment, with or without hard labour, for such term as the court shall award.* 9 *G.* 4, *c.* 31, *s.* 17.

*Evidence.*

The evidence is the same as in rape, with this exception, that it will be no defence that the girl consented. If she did not consent it will be a rape, and the defendant may be indicted accordingly: (*ante, p.* 480), but the fact of non-consent is no defence to an indictment for *this* offence. *Reg.* v. *Neale*, 1 *C. & K.* 591. The child must be proved to be above the age of ten years and under the age of twelve years. The defendant cannot, on an indictment for this offence, be convicted of an assault; the proper form of indictment, if the offence be not completed, is at common law, for an attempt to commit the statutable misdemeanor. *Reg.* v. *Martin*, 2 *Mood. C. C.* 123; 9 *C. & P.* 213, 215.

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### ASSAULT WITH INTENT TO COMMIT A RAPE.

*Statute.*

9 *G.* 4, *c.* 31, *s.* 25.]—(*Ante, p.* 458).

*Indictment.*

*Commencement as ante, p.* 480]—in and upon one A. N., in the peace of God and our lady the Queen then and there being, did make an assault, and her the said A. N. then and there did beat, wound, and ill treat, with intent her the said A. N., violently and against her will then and there feloniously to ravish and carnally know, and other wrongs to the said A. N., then and there did, to the great damage of the said A. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a count for a common assault. But see R.* v. *Dawson*, 3 *Stark.* 62.

*Misdemeanor, imprisonment, with or without hard labour, for not more than two years, or fine, or both; and to find, if required, sureties to keep the peace.* 9 *G.* 4, *c.* 31, *s.* 25, (*ante, p.* 458).

*Evidence.*

Prove an attempt to commit a rape, the offence being incomplete for want of evidence of penetration. To prove the intent, evidence of previous attempts to commit the same offence is not admissible. *R.* v. *Lloyd*, 7 *C. & P.* 318. If, upon this indictment, the prosecutrix were to prove a rape actually committed, the defendant must be acquitted. *See R.* v. *Harmwood*, 1 *East, P. C.* 411, 440.

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## SECT. 7.

### SODOMY.

*Statute.*

9 *G.* 4, *c.* 31, *s.* 15]—Enacts, that every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall suffer death as a felon.

Sect. 18.]—(*Ante, p.* 480).

*Indictment for Sodomy.*

*Commencement as ante, p.* 480]—in and upon one J. N., then and there being, feloniously did make an assault, and then and there feloniously, wickedly, and against the order of nature, had a venereal affair with the said J. N., and then and there feloniously carnally

knew him the said J. N., and then and there feloniously, wickedly, and against the order of nature, with the said J. N. did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, death.* 9 *G.* 4, *c.* 31, *s.* 15. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, (*ante, p.* 251).

*This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

The evidence is the same as in rape, (*see ante, p.* 481 *et seq.*), and, as in that case, penetration alone is sufficient to constitute the offence. *R.* v. *Reckspear*, 1 *Mood. C. C.* 342. There are, however, two exceptions: 1*st*, that it is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated; and 2*ndly*, both agent and patient (if consenting) are equally guilty. In *R.* v. *Wiseman*, *Fortesc.* 91, where the defendant was indicted for having committed this offence with a woman, a majority of the judges held that this was within the statute, but two or three of them held that it was not; no opinion was publicly given. *See Reg.* v. *Jellyman*, 8 *C.* & *P.* 604. If it be committed on a boy under fourteen years of age, it is felony in the agent only; 1 *Hale*, 670; 3 *Inst.* 59; and the same, it should seem, as to a girl under twelve.

Where the defendant forced open a child's mouth, and put in his private parts, and proceeded to the completion of his lust, the judges were of opinion that this did not constitute the offence of sodomy. *R.* v. *Jacobs*, *R.* & *R.* 331; 1 *Russ.* 698. The defendant may be convicted of the assault, if the evidence fail to make out the entire charge against him. 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, (*ante, p.* 253).

*Indictment for Bestiality.*

*Commencement as ante, p.* 487]—in the county aforesaid, with a certain *cow* [“*any animal*”] then and there being, feloniously, wickedly, and against the order of nature, had a venereal affair, and then and there feloniously, wickedly, and against the order of nature, carnally knew the said cow; and then and there feloniously, wickedly, and against the order of nature, with the said cow did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The animal was held to be described with sufficient certainty as “a certain bitch,” although the females of foxes and some other animals are designated bitches, as well as the females of dogs. Reg.* v. *Allen*, 1 *C.* & *K.* 495.

*Felony, death.* 9 *G.* 4, *c.* 31, *s.* 15. *This sentence may be recorded.* 4 *G.*4, *c.* 48, (*ante, p.* 251). *The carnal knowledge is proved in the same manner as in rape or sodomy.* (*See ante, p.* 481). *But the defendant cannot, upon this indictment, be convicted of an assault under stat.* 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 11, *which applies only where the charge*

*includes an offence against the person.* *Reg.* v. *Eaton*, 8 *C.* & *P.* 417. *An indictment for an attempt to commit this offence may readily be framed from this and the next precedent. It is punishable in the same manner as the attempt to commit sodomy. See R.* v. *Mulreaty*, 1 *Russ.* 699.

*This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

ASSAULT WITH INTENT TO COMMIT SODOMY.

*Statute.*

9 *G.* 4, *c.* 31, *s.* 25.]—(*Ante, p.* 458).

*Indictment.*

*Commencement as ante, p.* 480]—in and upon one J. N., in the peace of God and our lady the Queen then and there being, did make an assault, and him the said J. N. then and there did beat, wound, and ill treat, with intent that detestable and abominable crime (not to be named among Christians) called buggery, with the said J. N. then and there feloniously, wickedly, diabolically, and against the order of nature, to commit and perpetrate; to the great displeasure of Almighty God, to the great damage of the said J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, imprisonment, with or without hard labour, not exceeding two years, or fine, or both; and to find, if required, sureties to keep the peace.* 9 *G.* 4, *c.* 31, *s.* 25, (*ante, p.* 458).

*Evidence.*

Prove an attempt to commit sodomy, the offence being incomplete for want of evidence of penetration. If, however, the complete offence of sodomy be proved, the defendant must be acquitted.

An indictment against two persons, which charged that they, being persons of wicked and unnatural dispositions, did in a certain open and public place unlawfully meet together, with the intent of committing with each other, openly, lewdly, and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and *sodomitical practices*, and then and there unlawfully, wickedly, openly, lewdly, and indecently did commit with each other, in the sight and view of divers liege subjects, &c., divers such practices as aforesaid, &c., was held bad in arrest of judgment, for want of certainty. *Reg.* v. *Rowed*, 3 *Q. B.* 180; 2 *G.* & *D.* 518.

# PART II.

OFFENCES OF A PUBLIC NATURE.

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## CHAPTER I.

OFFENCES AGAINST THE QUEEN AND HER GOVERNMENT.



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### SECT. 1.

HIGH TREASON.

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*Indictment for compassing the Queen's Death.*

MIDDLESEX, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, a subject of our said lady the Queen then and there being, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lady the Queen, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, and on divers other days as well before as after, with force and arms, at the parish aforesaid, in the county aforesaid, maliciously and traitorously, together with divers other false traitors to the jurors aforesaid unknown, did compass, imagine, devise, and intend to depose our said lady the Queen from the royal state, title, power, and government of this realm, and from the style,

honour, and kingly name of the imperial crown thereof, and to bring and put our said lady the Queen to death: and the said treasonable compassing, imagination, device, and intention, then and there maliciously and traitorously did express, utter, declare, and evince, by divers overt acts and deeds hereinafter mentioned, that is to say: IN ORDER TO FULFIL, PERFECT, AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, device, and intention aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, to wit, on the said third day of August in the year aforesaid, and on divers other days as well before as after, with force and arms, at the parish aforesaid, in the county aforesaid, maliciously and traitorously did conspire, consult, consent, and agree with one A. B. C. D., and divers other false traitors, to the jurors aforesaid unknown, to raise, levy, and make insurrection, rebellion, and war within this kingdom, against our said lady the Queen; AND FURTHER TO FULFIL, PERFECT, AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, device, and intention aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, to wit, [*&c. &c., so proceeding to state other overt acts in the same manner; and then conclude the count thus*]: in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him the said J. S., against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

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It may be satisfactory, in this place, to enumerate the several acts which have been decided, or which have been deemed by writers upon the subject to be sufficient overt acts of compassing the death of the Queen.

Every thing wilfully or deliberately done or attempted, whereby the Queen's life may be endangered, is an overt act of compassing her death. *Fost.* 195. Killing the Queen is an overt act of compassing her death, and was so laid in the case of the regicides. *Kel.* 8. So, going armed for the purpose of killing the Queen; *R.* v. *Somerville et al.*, 1 *And.* 104; providing arms, ammunition, poison, or the like, for the purpose of killing the Queen; 1 *Hale*, 108; 3 *Inst.* 12; conspirators meeting and consulting of the means of killing the Queen; *Fost.* 195; *R.* v. *Vane*, *Kel.* 15: *R.* v. *Tong*, *Kel.* 17; *and see Kel.* 21; or of deposing her, or of usurping the powers of government; *R.* v. *Hardy*, 1 *East*, *P. C.* 60; or resolving to do it; *R.* v. *Rookwood*, 4 *St. Tr.* 661: *R.* v. *Charnock*, *Id.* 562; 2 *Salk.* 631; acting as counsel against the Queen, in order to take away her life; *R.* v. *Coke*, *Kel.* 12; *and see R.* v. *Harrison*, 2 *St. Tr.* 314: all these, and the like, are sufficient overt acts of compassing the Queen's death.

So, other species of high treason, which are distinct heads of treason in themselves, may be laid as overt acts of compassing the Queen's death: thus, levying war *directly* against the Queen; *Fost.* 195, 210, 212; 1 *Hale*, 122, 123, 151; *Kel.* 21; 3 *Inst.* 12, (but not a mere constructive levying of war, such as pulling down all inclosures, or the like, 1 *Hale*, 123; *see post*, *p.* 493); or even a conspiracy to

levy war directly against the Queen, for the purpose of dethroning her, or of obliging her to change her measures, or the like; *Fost.* 197, 211; 1 *Hale*, 119, 121; *R.* v. *Friend*, 4 *St. Tr.* 599: *R.* v. *Darrel*, 10 *Mod.* 321: *R.* v. *Layer*, 4 *St. Tr.* 229, 332: *R.* v. *Campion*, *Sav.* 3: *R.* v. *Lord Russell*, 3 *St. Tr.* 705; *and see Id.* 683, 701, 731: *R.* v. *Sidney*, 3 *St. Tr.* 807: *R.* v. *Cook*, 4 *St. Tr.* 737—776; (but not a conspiracy to effect a raising for the purpose of throwing down all inclosures, or of any other species of constructive levying of war, *Fost.* 213; *Per Holt*, C. J., *Holt*, 682; *Per Cur.* 10 *Mod.* 322); adhering to the Queen's enemies; *Fost.* 196, 197: *R.* v. *Harding*, 2 *Vent.* 315: *R.* v. *Lord Preston*, 4 *St. Tr.* 410—455: *R.* v. *Stone*, 6 *T. R.* 527; inciting foreigners to invade the realm; *Fost.* 196; 1 *Hale*, 120; 3 *Inst.* 14; *R.* v. *Story*, *Dy.* 298: *R.* v. *Parkyns*, 4 *St. Tr.* 627: all these are sufficient overt acts of compassing the Queen's death.

Writings which import a compassing of the Queen's death are sufficient overt acts of this species of treason, if published; 1 *Hale*, 118; 3 *Inst.* 14; *Fost.* 198; 1 *Hawk.* c. 17, s. 31; as, for instance, writings inciting persons to kill the Queen, *R.* v. *Twyn. Kel.* 22, or the like. *See the several cases collected in Pyne's case, Cro. Car.* 117. So, words of advice or persuasion are sufficient overt acts of this species of treason, if they advise or persuade to an act which would of itself (if committed) be a sufficient overt act. *Fost.* 195, 200: *R.* v. *Charnock*, 4 *St. Tr.* 562; 2 *Salk.* 631. So, words may be laid in the indictment to explain an act; as, for instance, an act seemingly innocent in itself may be shewn to be an overt act of treason, by its connexion with words spoken by the party at the time. 1 *Hale*, 115; *and see R.* v. *Parkyns*, 4 *St. Tr.* 627, 657: *R.* v. *Crohagan*, *Cro. Car.* 332: *R.* v. *Lee*, 7 *St. Tr.* 43. But loose words, which have no reference to any act or design, or which are not words of persuasion or advice, cannot be deemed overt acts of treason. *Fost.* 200—205: *R.* v. *Theving*, 3 *St. Tr.* 79—90.

Where words or writings, however, are laid as overt acts, it is sufficient to set forth the substance of them; *R.* v. *Francis*, 6 *St. Tr.* 58, 73: *R.* v. *Lord Preston*, 4 *St. Tr.* 411: *R.* v. *Watson*, 2 *Stark.* 137; for in no case is it necessary that the whole detail of the evidence should be set forth; it is sufficient that the charge be reduced to a reasonable certainty, so that the defendant may be apprised of its nature, and be prepared to answer it. *Fost.* 194.

Any number of overt acts may be laid; *Kel.* 8; but if any one sufficient overt act be proved, it will maintain the count. 1 *Hale*, 122; *Fost.* 194.

### *Evidence.*

The evidence must be applied to the proof of the overt acts, and not to the proof of the principal treason; for the overt act is the charge to which the prisoner must apply his defence. And whether the overt act proved be a sufficient overt act of the principal treason laid in the indictment, is a matter of law, to be determined by the court. It is also expressly enacted, that no evidence shall be admitted of any overt act not laid in the indictment; 7 & 8 *W.* 3, *c.* 3, *s.* 8; that is to say, no overt act amounting to a distinct independent charge, although it be an overt act of the species of treason charged, shall be admitted in evidence, unless it be expressly laid in

the indictment; but if an overt act not laid amount to a direct proof of any other overt act which is laid, it may be given in evidence to prove such overt act. *R.* v. *Rookwood*, 4 *St. Tr.* 661, 627: *R.* v. *Deacon*, *Fost.* 9: *R.* v. *Lowick*, 4 *St. Tr.* 718, 722, 731: *R.* v. *Layer*, 8 *Mod.* 82, 89; 6 *St. Tr.* 229, 282, 284: *R.* v. *Wedderbourn*, *Fost.* 22. (*Ante*, *p.* 109).

Although writings cannot be laid as an overt act, unless published, yet, if they tend to prove an overt act laid, they shall be admitted in evidence for that purpose, although never published. *R.* v. *Lord Preston*, 4 *St. Tr.* 410, 440: *R.* v. *Layer*, 6 *St. Tr.* 272—280: *R.* v. *Hensey*, 1 *Bur.* 642, 644. And in *Sidney's case*, if the papers found in his closet had been plainly referable to the other treasonable practices charged in the indictment, they might indisputably have been read in evidence against him, although not published. *Fost.* 198. Also, it is no objection that the writings, or any other articles, were not found until after the apprehension of the defendant. *R.* v. *Watson*, 2 *Stark.* 137.

Where words of incitement have reference to an act, after giving evidence of the words, you may give evidence of the act, in order fully to explain them. *R.* v. *Lord G. Gordon*, *Doug.* 590, 593.

Where a conspiracy is laid as an overt act, the acts of any of the conspirators in furtherance of the common design may be given in evidence against all. *R.* v. *Hardy*, 1 *East*, *P. C.* 70: *R.* v. *Stone*, 6 *T. R.* 527; *and see Kel.* 19, 20; (*ante*, *p.* 109). In such a case, the first thing to be proved is the conspiracy; secondly, evidence must be given to connect the defendant with it; and lastly, if it be intended to give in evidence against the defendant the acts of any other person, you must shew that such person was also a member of the same conspiracy, and that the act done was in furtherance of the common design. *See R.* v. *Sidney*, 3 *St. Tr.* 798, *&c.*: *R.* v. *Lord Lovat*, 9 *St. Tr.* 670, *&c.*; (*ante*, *p.* 105).

The time at which the overt acts are alleged to have been committed need not be proved as laid; it is sufficient if they be proved to have been committed at any time within three years before the finding of the indictment. *R.* v. *Charnock*, 1 *Salk.* 288: *R.* v. *Lord Balmerino*, 9 *St. Tr.* 587—605: *R.* v. *Townley*, *Fost.* 7, 8.

As to the place where the overt act is alleged to have been committed; an overt act must be proved to have been committed in the proper county. *See R.* v. *Lord Preston*, 4 *St. Tr.* 410—455. But if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act laid, though done in a foreign county, may be given in evidence; and this was done in nearly all the trials of the rebels in the year 1746. *Fost.* 9, 22.

Where several overt acts are laid, proof of any one of them will maintain the count, provided the overt act so proved is a sufficient overt act of the species of treason charged in the indictment. 1 *Hale*, 122; *Fost.* 194.

The prisoner is not bound to shew what was the object or meaning of the acts done by him: it is for the Crown to make out that they amount to the treason charged in the indictment. *Reg.* v. *Frost*, 9 *C. & P.* 129.

The prisoner is entitled, under the stat. 7 *Anne*, *c.* 21, in cases of treason or misprision of treason, (except in cases of high treason in

compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, and of misprision of such treason, where the overt acts alleged in the indictment shall be any attempt to injure her person, in which cases the prisoner is triable in the same manner, and upon the like evidence, as if charged with murder, 39 & 40 *G.* 3, *c.* 93; 5 & 6 *Vict. c.* 51, *s.* 1), to have a list of the witnesses to be produced on the trial, and of the jury, given to him at the same time that the copy of the indictment is delivered to him; and the copy of the indictment, with such lists, is to be delivered to him ten days before the trial. A bill of indictment for treason was found on the 11th December; on the 12th, copies of the indictment and of the jury panel were delivered to the prisoner, and on the 17th, a copy of the list of witnesses was delivered to him. The prisoner was arraigned on the 31st December, and pleaded: and upon the first witness being called for the Crown, it was objected that the list of witnesses had not been delivered according to the statute. Upon a case reserved, it was holden by nine judges to six, that the delivery of the list was not a good delivery in point of law: but it was also holden, by a like majority, that the objection was too late after plea pleaded. And it was agreed by all the judges, that if the objection had been taken in due time, the only effect of it would have been a postponement of the trial, to give time for a proper delivery of the list. *Reg.* v. *Frost*, 2 *Mood. C. C.* 140; 9 *C.* & *P.* 129.

No treason, misprision of treason, or offence against the Queen's title, prerogative, person, or government, or against either house of Parliament, is triable at any quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

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*Form of a Count for levying War.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a subject of our said lady the Queen, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lady the Queen, and wholly withdrawing the allegiance, fidelity, and obedience, which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, on the said third day of August, in the ninth year of the reign aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, together with divers other false traitors to the jurors aforesaid unknown, armed and arrayed in a warlike manner, that is to say, with guns, muskets, blunderbusses, pistols, swords, bayonets, pikes, and other weapons, being then and there unlawfully, maliciously, and traitorously assembled and gathered together against our said lady the Queen, most wickedly, maliciously, and traitorously did levy and make war against our said lady the Queen within this realm, and did then and there maliciously and traitorously attempt and endeavour by force and arms to subvert and destroy the constitution and government of this realm as by law established, and deprive and depose our said lady the Queen of and from the style, honour, and kingly name of the imperial crown of this realm; in contempt of our said lady the Queen

and her laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him the said J. S.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*In this count it is not necessary to set out the particular acts of the defendant; it is sufficient to allege, generally, that he assembled with a multitude, armed and arrayed in a warlike manner, and levied war. Fost.* 220.

*Evidence.*

In order to maintain this count, it is necessary to prove that which in law amounts to a levying of war, directly or constructively, against the Queen in her realm: and to prove that the defendant was either actually engaged in it, or present aiding and abetting.

In order to constitute a levying of war, the number of persons assembled is not material; three or four will constitute it, as fully as a thousand. 3 *Inst.* 9. Nor is it necessary that they should be *more guerrino arraiati*, armed with military weapons, with colours flying, &c., although it is usually so stated in the indictment. *Fost.* 208; *and see R.* v. *Dammaree & Purchase, Fost.* 208. Nor is actual fighting necessary to constitute a levying of war; *Fost.* 218: 1 *Hale*, 144: for, as the court held in *Vaughan's case*, (5 *St. Tr.* 17—39; 2 *Salk.* 634), enlisting and marching are sufficient, without coming to battle. There must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature. *Reg.* v. *Frost*, 9 *C. & P.* 129. After an action has taken place, it is termed *bellum percussum;* before it, *bellum levatum.*

War levied against the Queen is of two kinds—direct and constructive: direct, when the war is levied directly against the Queen or her forces, with intent to do some injury to her person, to imprison her or the like; 1 *Hale*, 131, 132; such, for instance, as open rebellion, for the purpose of deposing or imprisoning the Queen, or of getting her into the power of the rebels, or of forcing her to put away her ministers, or the like; 1 *Hale*, 152: *Fost.* 210; *and see R.* v. *The Earls of Essex and Southampton, Moor.* 620; 1 *St. Tr.* 197; holding or defending any of the Queen's castles, forts, or ships against the Queen or her forces, or delivering them up to rebels, through treachery; 3 *Inst.* 10; *Fost.* 219; 1 *Hale*, 325, 326; constructive, where it is levied for the purpose of effecting innovations of a public and general nature by an armed force; *Fost.* 211; as, for the purpose of attempting by force to obtain the repeal of a statute, to alter the religion established by law, or to obtain the redress of any other public grievance, real or pretended; 1 *Hawk. c.* 17, *s.* 25; 1 *Hale*, 153; *Fost.* 211; 3 *Inst.* 9, 10; *R.* v. *Lord G. Gordon, Dougl.* 590; or an insurrection for the purpose of throwing down all inclosures, pulling down all bawdy houses, opening all prisons, &c., expelling all strangers, enhancing the price of wages generally, or the like. *Fost.* 214; 1 *Hale*, 132; *R.* v. *Bradshaw. Poph.* 122: *R.* v. *Messenger, Kel.* 70—79. Therefore, where a mob assembled for the purpose of destroying all the protestant dissenting meeting houses, and actually pulled down two, it was holden to be treason. *R.* v. *Dammaree*, 8 *St. Tr.* 218: *R.* v. *Purchase, Id.* 267. But an insurrection for the purpose of throwing down the inclosures of a particular manor, park, common, &c., or upon a mere quarrel between private persons, *Fost.*

210; 1 *Hale*, 131, 133, 149, or to deliver one or more particular persons out of prison, (they not being imprisoned for treason), 1 *Hale*, 134, or holding a house by force against the sheriff and *posse comitatus*, 1 *Hale*, 146, is not treason. So, if an armed body of men enter a town, their object being not to take it, or to attack the military force there, but merely to make a demonstration of their strength to the magistracy, in order to procure the liberation or mitigate the punishment of prisoners convicted of some political offence, this, though an aggravated misdemeanor, is not high treason. *Reg.* v. *Frost*, 9 *C. & P.* 129.

Also, in order to maintain this count, proof must be given of a war actually levied, and not merely of a conspiracy to levy it. 1 *Hale*, 131—148; 1 *Hawk. c.* 17, *s.* 27.

It may be necessary here to mention, that, in the case of war levied directly against the Queen, all persons assembled and marching with the rebels are guilty of treason, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence, or not: *R.* v. *The Earls of Essex and Southampton*, *Moor*, 621; unless compelled to join and continue with them *pro timore mortis*. *Fost.* 216, 217: 3 *Inst.* 10; 1 *Hale*, 49, 51, 139; *and see R.* v. *M'Growther*, *Fost.* 13. But in the case of a constructive levying of war, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason, are traitors; the rest are merely rioters. *See R.* v. *Messenger*, *Kel.* 70—79; 1 *Sid.* 358; 2 *St. Tr.* 585—594.

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*Form of a Count for adhering to the Queen's Enemies.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that, on the said third day of August, in the year last aforesaid, and long before, and continually from thence hitherto, an open and public war was and is yet prosecuted and carried on between our said lady the Queen and ——, to wit at the parish aforesaid, in the county aforesaid; and that the said J. S., a subject of our said lady the Queen then and there being, well knowing the premises, but not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lady the Queen, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, and contriving and with all his strength intending to aid and assist the said ——, so being an enemy of our said lady the Queen, as aforesaid, in the prosecution of the said war against our said lady the Queen, heretofore and during the said war, to wit, on the said third day of August, in the year last aforesaid, and on divers other days as well before as after, with force and arms, at the parish aforesaid, in the county aforesaid, maliciously and traitorously was adhering to, and aiding and comforting the said ——, so being then and there an enemy of our said lady the Queen as aforesaid: AND THAT in the prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said J. S., as such false traitor as aforesaid, during the said war, to wit, on the said third day of August, in the year last aforesaid, and on divers [*&c.*

*here set out the overt acts, introducing each overt act thus:* and in further prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, and during the said war, to wit, on *&c. &c.; and concluding the count thus*]: in contempt of our said lady the Queen and her laws, to the evil example of all others in like cases offending, contrary to the duty of the allegiance of him the said J. S.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The special acts of adherence must be set forth in the indictment as overt acts; but it is not necessary in this or in any other case of treason, that, in laying the overt acts, a detail of the evidence intended to be given at the trial should be stated; it is sufficient if the charge be reduced to a reasonable certainty, so that the defendant may be apprised of the nature of the offence with which he is charged. Fost.* 220, 194.

We shall now state what has been decided or deemed to be overt acts of this species of treason.

The words in the statute are—" or be adherent to the enemies of our lord the King in his realm, giving to them aid or comfort in the realm or elsewhere." Hence, every assistance given by the Queen's subjects to her enemies, unless given from a well-grounded apprehension of immediate death in case of a refusal, is high treason within this branch of the statute. Therefore, if British subjects join the Queen's enemies in acts of hostility against this country, *Fost.* 216; 1 *Hawk. c.* 17, *s.* 28, or even against the Queen's allies; *Fost.* 220; *Per Cur. in R.* v. *Vaughan*, 2 *Salk.* 635, or join the enemy's forces, although no acts of hostility be committed by them either against the Queen or her allies, *Fost.* 218; *R.* v. *Vaughan*, 2 *Salk.* 634; 5 *St. Tr.* 17, or raise troops for the enemy, *R.* v. *Harding*, 2 *Vent.* 315, or deliver up the Queen's castles, forts, or ships of war to the Queen's enemies through treachery, or in combination with them, *Fost.* 219; 3 *Inst.* 10; 1 *Hale*, 168, or even detain the Queen's castles, &c. from her, if it be done in confederacy with the enemy, *Fost.* 219; 1 *Hale*, 326, or send money, arms, intelligence, or the like, to the Queen's enemies, *Fost.* 217, although such money, intelligence, &c. be intercepted and never reach them: *R.* v. *Gregg*, 10 *St. Tr. App.* 77; *Fost.* 198, 217, 218: *R.* v. *Hensey*, 1 *Bur.* 642: *R.* v. *Lord Preston*, 4 *St. Tr.* 409—455: all these are cases of adhering to the Queen's enemies, and the parties are guilty of high treason. And where letters, &c. have been thus intercepted, it is much better to charge them to have been sent from the place where the venue was laid, *to be* delivered in parts beyond the seas to the enemy, according to the fact, than to state them to have been sent *in partes transmarinas*, to be delivered to the enemy. *Fost.* 218. In *R.* v. *Stone*, 6 *T. R.* 527, it was objected, that the intelligence transmitted by the defendant to the enemy was calculated to dissuade them from invading this country, and was sent with that intent; but Lord *Kenyon*, C. J., said, that whether the intelligence were calculated to dissuade or invite the enemy, was immaterial: if it were such as was likely to prove useful to them, in enabling them to annoy us, defend themselves, or shape their attacks; sending such intelligence with a view of its reaching the enemy was undoubtedly high treason. If a British subject incite foreigners to invade this country, it is treason, whether the foreigners be enemies or not; if enemies, it is treason within this branch of the

statute: if not enemies, still it is an overt act of compassing the Queen's death. *Fost.* 196, 197; 1 *Hale*, 167. But if a British subject be in a foreign country when war breaks out between that country and this, and continue to reside there, or if during a truce he go to the foreign country, and return before the truce expires, this is no treason, unless he actually conspire with the enemy, or aid him in forwarding his measures for hostility. 1 *Hale*, 165, 166.

As to the Queen's enemies, within the meaning of this statute;—the subjects of all states against which her Majesty may have proclaimed or declared war, are her enemies; so are the subjects of states in actual hostility with us, whether war have been solemnly proclaimed or not. *Fost.* 219; 1 *Hale*, 162. But merely issuing letters of marque does not create a state of hostility between two states, although nearly equal to a state of war in its consequences. 1 *Hale*, 162. Nor is inciting the subjects of a state in amity with us to invade this country, treason within this branch of the statute, although it certainly would be an overt act of compassing the Queen's death. 1 *Hale*, 167. But if the subjects of a state in amity with us were to invade the country in a hostile manner, or otherwise commit hostilities against us, they would be enemies within the meaning of this statute, and adhering to them would be treason. *Fost.* 219; 1 *Hale*, 164; 3 *Inst.* 11; 4 *Inst.* 152; *R.* v. *Vaughan*, 2 *Salk.* 634; 5 *St. Tr.* 17—39. British subjects, however, can never be deemed the Queen's enemies within the meaning of this act, and therefore, to give relief or assistance to a rebel would not be treason within this branch of the statute. 3 *Inst.* 11; 1 *Hale*, 159; 1 *Hawk. c.* 17, *s.* 28.

It must appear upon the face of the indictment, that the persons adhered to were enemies.

### *Evidence.*

The count is proved in the same manner as the count for compassing the Queen's death, (*see ante, p.* 490 *et seq.*), namely, by proving one or more of the overt acts laid. The fact of the persons adhered to being enemies, may be proved by the production of the Gazette containing the proclamation, if war were formally proclaimed; or public notoriety is sufficient evidence of it. 19 *E.* 4, 6, 5; *Fost.* 219; 1 *Hale*, 164. And whether they are enemies or not, is a matter of fact to be determined by the jury. *Ib.*

An actual adherence must be proved; a mere conspiracy or intention to adhere is not treason within this branch of the statute, although probably such a conspiracy might be laid as an overt act of compassing the Queen's death. But if you can prove such a conspiracy, and connect the defendant with it by evidence, and can prove an act done by any one of the conspirators in furtherance of the common design, you may give it in evidence against the defendant, if it tend to prove any of the overt acts laid in the indictment; for the act of one, in such a case, is the act of all. *R.* v. *Stone*, 6 *T. R.* 527 (*see ante, p.* 109).

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*Form of a Count on Stat. 36 G. 3, c. 7, s. 1, for conspiring to incite Foreigners to invade the Realm.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a subject of our said lady the Queen, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lady the Queen, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, on the third day of August, in the year last aforesaid, and on divers other days and times as well before as after, with force and arms, at the parish aforesaid, in the county aforesaid, maliciously and traitorously, together with divers other false traitors to the jurors aforesaid unknown, did compass, imagine, invent, devise, and intend to move and stir divers foreigners and strangers, to wit ——, and divers other foreigners and strangers to the jurors aforesaid unknown, with force and arms, to invade this realm; and the said compassing, imagination, invention, device, and intention, did then and there express, utter, and declare, by divers overt acts and deeds hereinafter mentioned, that is to say; IN ORDER TO FULFIL, PERFECT, AND BRING TO EFFECT his said most evil and wicked treason, and treasonable compassing, imagination, invention, device, and intention aforesaid [*&c. &c. setting out the overt acts, and concluding the count as in the form ante, p.* 489].

*The evidence necessary to support this count may readily be made out from the directions given ante, p.* 490, *the same rules applying equally to this count as to the count for compassing the Queen's death.*

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*Form of other Counts upon Stat. 36 G. 3, c. 7, s. 1.*

*Commencement ut supra*]—did compass, imagine, invent, devise, and intend the death and destruction of our said sovereign lady the Queen; and the said compassing, *&c. &c., ut supra.*

*Commencement ut supra*]—did compass, imagine, invent, devise, and intend certain bodily harm tending to the death and destruction of our said sovereign lady the Queen; and the said compassing, *&c, &c., ut supra.*

*Commencement ut supra*]—did compass, imagine, invent, devise, and intend to maim and wound our said sovereign lady the Queen; and the said compassing, *&c. &c., ut supra.*

*Commencement ut supra*]—did compass, imagine, invent, devise, and intend the imprisonment and restraint of the person of our said sovereign lady the Queen; and the said compassing, *&c. &c., ut supra.*

*Commencement ut supra*]—did compass, imagine, invent, devise, and intend to deprive and depose our said sovereign lady the Queen of

and from the style, honour, and kingly name of the imperial crown of this realm; and the said compassing, *&c. &c., ut supra.*

*Commencement ut supra*]—did compass, imagine, invent, devise, and intend to levy war against our said sovereign lady the Queen, within this realm, in order by force and constraint to compel her said Majesty to change her measures and councils; which said compassing, *&c. &c., ut supra.*

*Commencement ut supra*]—did compass, imagine, invent, devise, and intend to levy war against our said sovereign lady the Queen, within this realm, in order to put force and constraint upon, and to intimidate and overawe, both houses of Parliament; which said compassing, *&c. &c.*

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## DISCHARGING OR AIMING &c., FIRE-ARMS &c., AT THE QUEEN.

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### *Statute.*

*5 & 6 Vict. c. 51, s. 2*]—Enacts, that from and after the passing of this act, if any person shall wilfully discharge, or attempt to discharge, or point, aim, or present at or near to the person of the Queen, any gun, pistol, or any other description of fire-arms or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material, or shall discharge or cause to be discharged, or attempt to discharge or cause to be discharged, any explosive substance or material near to the person of the Queen, or if any person shall wilfully strike or strike at, or attempt to strike or strike at, the person of the Queen, with any offensive weapon or in any other manner whatsoever, or if any person shall wilfully throw or attempt to throw any substance, matter, or thing whatsoever at or upon the person of the Queen, with intent in any of the cases aforesaid to injure the person of the Queen, or with intent in any of the cases aforesaid to break the public peace, or whereby the public peace may be endangered, or with intent in any of the cases aforesaid to alarm her Majesty; or if any person shall, near to the person of the Queen, wilfully produce or have any gun, pistol, or any other description of fire-arms, or other arms whatsoever, with intent to use the same to injure the person of the Queen, or to alarm her Majesty; every such person so offending shall be guilty of a high misdemeanor, and, being convicted thereof in due course of law, shall be liable, at the discretion of the court before which the said person shall be so convicted, to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, for any period not exceeding three years, and during the period of such imprisonment to be publicly or privately whipped, as often and in such manner and form as the said court shall order and direct, not exceeding thrice.

Sect. 3.]—Provided, that nothing herein contained shall be deemed to alter in any respect the punishment which by law may now be inflicted upon persons guilty of high treason or misprision of treason.

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### *Indictment for Presenting a Pistol at the Queen.*

*Commencement as ante, p.* 169]—in the county aforesaid, a certain pistol [*any gun, pistol, or any description of fire-arms or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material*], which he the said J. S. in his right hand then and there had and held, unlawfully and wilfully did point, aim, and present at [*at or near to*] the person of our lady the Queen, with intent thereby then and there to injure the person of our said lady the Queen; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add other counts varying the intent according to the terms of the statute.*

*Misdemeanor, transportation for seven years, or imprisonment, with or without hard labour, not exceeding three years, with whipping during such imprisonment, as often and in such manner as the court shall order, not exceeding thrice.* 5 *&* 6 *Vict. c.* 51, *s.* 2.

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante, p.* 69).

#### *Evidence.*

Prove that the defendant presented the pistol at or near to the person of the Queen, as the case may be; and the intent as directed *ante, p.* 104. It is immaterial whether the weapon was loaded or not.

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### *Indictment for Throwing at the Person of the Queen.*

*Commencement as ante, p.* 169]—in the county aforesaid, unlawfully and wilfully did throw [*throw or attempt to throw*] at [*at or upon*] the person of our lady the Queen, a certain substance, to wit, a certain stone, [*any substance, matter, or thing whatsoever*], with intent thereby then and there to alarm our said lady the Queen; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts varying the intent.*

*Misdemeanor. See the last precedent.*

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## SECT. 2.

### COINING IN GENERAL.

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#### *Statute.*

2 *W.* 4, *c.* 34, *s.* 15—*Venue*]—Enacts, that where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, all or any of the said offenders

may be dealt with, indicted, tried, and punished, and their offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner as if the offence had been actually and wholly committed within such one county or jurisdiction: Provided always, that crimes and offences against this act, committed in Scotland, shall be proceeded against and tried in Scotland, in such manner and form as crimes and offences generally have been heretofore tried in that country.

Sect. 21—*Interpretation—Current Coin—Counterfeit Coin—Criminal Possession*]—Declares and enacts, that where "the King's current gold or silver coin," or "the King's current copper coin," shall be mentioned in any part of this act, the same shall be deemed to include and denote any gold or silver coin or any copper coin respectively coined in any of His Majesty's Mints, and lawfully current in any part of his Majesty's dominions, whether within the United Kingdom or otherwise; and that any of the King's current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble or be apparently intended to resemble or pass for any of the King's current coin of a higher denomination, shall be deemed and taken to be counterfeit coin within the intent and meaning of those parts of this act wherein mention is made of "false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the King's current gold or silver coin;" and that, where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession, within the meaning of this act.

Sect. 17—*Proof of Coin being counterfeit*]—Declares and enacts, that where, upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of his Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.

Sect. 19—*Place and Mode of Imprisonment for Coining*]—Enacts, that where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet. *See* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

## COUNTERFEITING THE GOLD AND SILVER COIN OF THE REALM.

### *Statute.*

2 *W.* 4, *c.* 34, *s.* 3]—Enacts, that if any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every such offence shall be deemed to be complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

### *Indictment.*

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, ten pieces of false and counterfeit coin, each piece thereof resembling, and apparently intended to resemble and pass for ("*resembling or apparently intended to resemble or pass for*") a piece of the Queen's current gold ("*gold or silver*") coin, called a sovereign, falsely and feloniously did make and counterfeit ("*make or counterfeit*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 20.

*Felony, transportation for life or for not less than seven years, or imprisonment, (with or without hard labour, and with or without solitary confinement,* 2 *W.* 4, *c.* 34, *s.* 19, *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding four years,* 2 *W.* 4, *c.* 34, *s.* 3.

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

It is rarely the case that the counterfeiting can be proved directly by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and abetting in counterfeiting the coin in question. Before the late act, if several conspired to counterfeit the Queen's coin, and one of them actually did so in pursuance of the conspiracy, it was treason in all, and they might all have been indicted for counterfeiting the Queen's coin generally; 1 *Hale,* 214; but now, only the party who

actually counterfeits would be the principal felon, and the other accessaries before the fact.

A variance between the indictment and the evidence, in the number of the pieces of coin alleged to be counterfeited, is immaterial: but a variance as to the denomination of such coin, as guineas, sovereigns, shillings, &c., would be fatal.

By the old law, the counterfeit coin produced in evidence must have appeared to have that degree of resemblance to the real coin, that it would be likely to be received as the coin for which it was intended to pass, by persons using the caution customary in taking money. In *R.* v. *Varley*, 2 *W. Bl.* 682; 1 *East, P. C.* 164, the defendant had counterfeited the resemblance of a half-guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was; and the judges held that the offence was incomplete. So, in *R.* v. *Harris*, 1 *Leach*, 165, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely, immersion in diluted *aqua fortis*, before they could pass as shillings; the judges held that the offence was incomplete. A trifling variance from the real coin, in the inscription, effigies, or arms, however, did not take the case out of the statute; 1 *Hale*, 215; and although the counterfeit coin were made of a different metal from the real coin, as lead, tin, copper, &c., gilt or silvered over, yet it was within the meaning of the statute, and the making of such counterfeit coin was treason. *Ib.* Also, where the counterfeit coin was made to resemble the smooth worn shillings then in circulation, without any impression whatever upon them, the case was holden to be within the statute. *R.* v. *Wilson*, *Leach*, 285: *R.* v. *Welsh*, *Id.* 293. And now, by statute 2 *W.* 4, *c.* 34, *s.* 3, the offence of counterfeiting shall be deemed complete, although the coin made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

Any credible witness may prove the coin to be counterfeit, and it is not necessary for this purpose to produce any moneyer or other officer from the mint. 2 *W.* 4, *c.* 34, *s.* 17.

If it become a question whether the coin, which the counterfeit money was intended to imitate, be the Queen's coin, it is not necessary to produce the proclamation to prove its legitimation; it is a mere question of fact, to be left to the jury upon evidence of usage, reputation, &c. 1 *Hale*, 196, 212, 213.

It is not necessary to prove that the counterfeit coin was uttered or attempted to be uttered. 1 *Hale*, 215, 229; 3 *Inst.* 16; 1 *East, P. C.* 165.

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## COLOURING, &c. COIN.

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### *Statute.*

2 *W.* 4, *c.* 34, *s.* 4]—Enacts, that if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over, any coin

whatsoever resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or silver, wash, colour, or case over, any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin; or if any person shall gild, or shall, with any wash or materials capable of producing the colour of gold, wash, colour, or case over, any of the King's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the King's current gold coin; or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or silver, wash, colour, or case over, any of the King's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the King's current gold or silver coin; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

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### *Indictment for Colouring Coin.*

*Commencement as ante, p.* 501]—in the county aforesaid, falsely, deceitfully, and feloniously did gild (*"gild or silver"*) [*or* wash (*"wash, colour, or case over"*) with a certain wash (*"any wash or materials"*) capable of producing the colour of gold (*"gold or silver"*),] a certain false and counterfeit coin resembling (*"resembling or apparently intended to resemble or pass for"*) a certain piece of the Queen's current gold coin, (*"any of the Queen's current gold or silver coin"*), called a sovereign; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 19.

*Felony, transportation for life or not less than seven years, or imprisonment, (with or without hard labour, and with or without solitary confinement,* 2 *W.* 4, *c.* 34, *s.* 19, *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding four years.* 2 *W.* 4, *c.* 34, *s.* 4. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove the gilding, &c., or colouring, as stated in the indictment. Where the defendant was apprehended in the act of making counterfeit shillings by steeping round blanks, composed of brass and silver, in *aqua fortis*, none of which were finished, but exhibited the appearance of lead, though by rubbing, they readily acquired

the appearance of silver, and would pass current; it was doubted whether this was within the late act, but the judges held the conviction to be right. *R.* v. *Case,* 1 *Leach,* 145; 1 *East, P. C.* 165. And in another case a doubt was expressed whether an immersion of a mixture, composed of silver and base metal, into *aqua fortis,* which draws the silver to the surface, was a colouring within the repealed statutes, and whether they were not intended to apply only to a colouring produced by a superficial application. *R.* v. *Lacey,* 1 *Leach,* 153; 1 *East, P. C.* 166. But these cases were decided upon the statutes 8 & 9 *W.* 3, *c.* 26, *and* 15 *G.* 2, *c.* 28; and the words "capable of producing" seem to have been introduced into the present statute for the purpose of obviating the doubt. Where a wash or material is alleged to have been used by the defendant, it must be shewn either from the application by the defendant, or from an examination of their properties, that they are capable of producing the colour of gold or silver. But an indictment, charging the use of such material, will be supported by proof of a colouring with gold itself. *Reg.* v. *Turner,* 2 *Mood. C. C.* 41.

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### *Indictment for Colouring Metal, &c.*

*Commencement as ante, p.* 501]—in the county aforesaid, falsely, deceitfully, and feloniously did gild ("*gild or silver*") [*or* wash ("*wash, colour, or case* over") with a certain wash ("*any wash or materials*") capable of producing the colour of gold ("*gold or silver*")] ten pieces of silver ("*any piece of silver or copper, or of coarse gold, or coarse silver, or of any metal or mixture of metals*"), each piece thereof being respectively of fit size and figure to be coined, and with intent that each of the said pieces of silver respectively should be coined into false and counterfeit coin, resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the Queen's current gold coin, called a sovereign; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. 2 W. 4, c. 34, s. 4. See the last precedent. The statute applies also to the gilding or colouring of any silver coin, with intent to make the same resemble or pass for gold coin, and to gilding or colouring any copper coin, with intent to make the same resemble or pass for gold or silver coin. And an indictment charging the gilding of sixpences "with materials capable of producing the colour of gold" is good, and is supported by proof of colouring sixpences with gold. Reg.* v. *Turner,* 2 *Mood. C. C.* 41.

*This offence is not triable at any quarter sessions. 5 & 6 Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove the colouring &c. as in the last case, and the intent as stated in the indictment. For this purpose it may be proved that the defendant had the instruments for coining, or that other counterfeit money was found in his possession, or other circumstances may be given in evidence from which the jury may infer the intent. (*See ante, p.* 122).

### Indictment for Filing or Altering Coin.

*Commencement as ante, p.* 501]—in the county aforesaid, ten pieces of the Queen's current coin called sixpences, falsely, deceitfully, and feloniously did file, ("*file, or in any manner alter*") with intent to make each of the said pieces respectively resemble ("*resemble or pass for*") a piece of the Queen's current gold coin called a half-sovereign; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony.* 2 *W.* 4, *c.* 34, *s.* 4. *See the last precedent but one. The statute also applies to the filing or altering any of the Queen's copper money, with intent to make the same resemble or pass for any of the Queen's current gold or silver coin.*

*This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### Evidence.

Prove the filing and altering as stated in the indictment, and the intent by circumstances from which it may be inferred by the jury. (*See ante, p.* 122).

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## IMPAIRING GOLD AND SILVER COIN.

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### Statute.

2 *W.* 4, *c.* 34, *s.* 5]—Enacts, that if any person shall impair, diminish, or lighten any of the King's gold or silver coin, with intent to make the coin so impaired, diminished, or lightened, pass for the King's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years.

### Indictment.

*Commencement as ante, p.* 501]—in the county aforesaid, ten pieces of the Queen's current gold ("*gold or silver*") coin called sovereigns, falsely, deceitfully, and feloniously did impair, ("*impair diminish, or lighten*"), with intent to make each of the said pieces so impaired [diminished and lightened] pass for a piece of the Queen's current gold ("*gold or silver*") coin called a sovereign; against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 20.

*Felony, transportation for not more than fourteen years nor less than seven years, or imprisonment with or without hard labour, (and with or without solitary confinement,* 2 *W.* 4, *c.* 34, *s.* 19, (*ante, p.* 501), *such confinement not exceeding one month at any one time, nor three months*

*in auy one year, 7 W. 4 & 1 Vict. c. 90, s. 5. (ante, p. 169) ), not exceeding three years. 2 W. 4, c. 34, s. 5.*

## *Evidence.*

Prove the impairing, &c., by direct or presumptive evidence, as that the defendant was in possession of filings of impaired coin, or of the instruments for filing. Prove, also, the intent by evidence from which it may be inferred by the jury; as, for instance, that the defendant attempted to pass the coin, or had passed other coin so impaired, or that he carried it about him mixed with other money, particularly if it was not so impaired as apparently to affect its currency.

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## BUYING OR IMPORTING COUNTERFEIT COIN.

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## *Statute.*

2 *W.* 4, *c.* 34, *s.* 6]—Enacts, that if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; or if any person shall import into the United Kingdom from beyond the seas, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit: every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

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## *Indictment for Buying or Selling Counterfeit Coin at a lower Rate than by its Denomination it imports.*

*Commencement as ante, p.* 501]—in the county aforesaid, ten pieces of false and counterfeit coin, each piece thereof resembling (" *resembling, or apparently intended to resemble or pass for*") a piece of the Queen's current gold (" *gold or silver*") coin called a sovereign, falsely, deceitfully, and feloniously did put off (" *buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off*") to one J. N., at and for a lower rate and value than the same by their denomination did then and there import, and were respectively coined and counterfeited for, that is to say, for the sum of ten shillings; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 20.

*Felony, transportation for life or not less than seven years, or imprisonment, (with or without hard labour, and with or without solitary*

*confinement,* 2 *W.* 4, *c.* 34, *s.* 19, (*ante, p.* 501), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5 ; (*ante, p.* 169) ), *not exceeding four years.* 2 *W.* 4, *c.* 34, *s.* 6.

*This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant put off, &c., the counterfeit coin as mentioned in the indictment. Under the repealed statute, 8 & 9 *W.* 3, *c.* 26, it was holden that the putting off must be complete: and therefore, where the defendant laid on a table a quantity of counterfeit shillings, forwhich he was to receive a certain sum, but while the counterfeit money was being counted, and before the defendant received the price of it, he was apprehended, it was decided not to be within the act. *R.* v. *Woolridge,* 1 *Leach,* 307; 1 *East, P. C.* 179. The recent act contains the words "offer to buy, sell," &c., and therefore would include the case above mentioned.

Prove, also, that the coin put off, &c., was counterfeit. The words of the old statute were, "any counterfeit milled money, or any milled money whatsoever, unlawfully diminished and not cut in pieces." *See R.* v. *Browning,* 1 *Leach,* 624; 1 *East, P. C.* 180. The words of the present statute are, "any false or counterfeit coin, resembling, or apparently intended to resemble or pass for the King's current gold or silver coin." And this statute does not include the putting off, &c., of money unlawfully diminished, and not cut in pieces, for less value, which consequently is not now a statutable offence.

It must also be proved that it was sold at a lower rate than by its denomination it imports; and this being considered to be the averment of a contract must be proved as laid. Where an indictment stated that five counterfeit shillings were put off for two shillings, and the proof was that they were sold for two shillings and sixpence, *Thompson,* C. B., and *Heath,* J., held, that as this was a contract, it must be proved as laid, and directed an acquittal. *R.* v. *Joyce, Car. Sup.* 184; 3 *C.* & *P.* 411. But where the indictment stated that the defendant put off a counterfeit sovereign, and three counterfeit shillings, for five shillings, and the evidence was that the sovereign was sold for four shillings, and the shillings for one shilling, *Vaughan,* B., held the evidence to be sufficient, because the whole was one transaction. *R.* v. *Hodges,* 3 *C.* & *P.* 410.

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*Indictment for Importing Counterfeit Coin.*

*Commencement as ante, p.* 501]—in the county aforesaid, ten thousand pieces of false and counterfeit coin, each piece thereof resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the Queen's current silver ("*gold or silver*") coin called a shilling, falsely, deceitfully, and feloniously did import from beyond the seas, into that part of the United Kingdom called England, he the said J. S., at the said time when he so imported the said pieces of false and counterfeit coin, then and there well knowing the same to be false and counterfeit; against the form of the statute

in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 20.

*Felony.* 2 *W.* 4, *c.* 34, *s.* 6, (*ante, p.* 506). *See the last precedent.*

*Evidence.*

Prove that the defendant imported the counterfeit coin. It would seem to be no offence within this section to import from the Queen's dominions beyond the seas; 1 *Hawk. c.* 17, *s.* 87; 1 *East, P. C.* 175; because the counterfeiting there is punishable by the laws of England. Prove also the defendant's guilty knowledge; for unless that be averred in the indictment, and proved, it is no offence. 1 *Hale,* 128; 1 *East, P. C.* 175.



UTTERING COUNTERFEIT COIN.

*Statute.*

2 *W.* 4, *c.* 34, *s.* 7]—Enacts, that if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person, who shall have been convicted of any of the misdemeanors, or crimes and offences, hereinbefore mentioned, shall afterwards commit any of the said misdemeanors, or crimes and offences, such persons shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

Sect. 9—*Proof of former Conviction*]—Enacts, that where any person who shall have been convicted of any offence against this act, shall afterwards be indicted for any offence against this act committed

subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same; and for every such copy a fee of six shillings and eight pence, and no more, shall be demanded or taken; and if any such clerk, officer, or deputy shall certify or utter as true any false copy of any indictment or conviction for any offence against this act, knowing the same to be false, or if any person other than such clerk, officer, or deputy shall sign or certify any copy of any such indictment or conviction, as such clerk, officer, or deputy, or shall utter any copy thereof with a false or counterfeit signature thereto, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding two years.

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*Indictment for uttering Counterfeit Coin.*

*Commencement as ante, p.* 501]—in the county aforesaid, one piece of false and counterfeit coin resembling ("*resembling, or apparently intended to resemble or pass for*") a piece of the Queen's current gold ("*gold or silver*") coin called a sovereign, unlawfully, falsely, and deceitfully did utter ("*tender, utter, or put off*") to one J. N., he the said J. S., at the time he so uttered the said piece of false and counterfeit coin, then and there well knowing the same to be false and counterfeit; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *An indictment which stated that the defendant uttered a counterfeit half-crown to J. N., "knowing the same to be false and counterfeit," [without any words "then and there," &c.] was held sufficient. Reg.* v. *Page,* 9 *C. & P.* 756; 2 *Mood. C. C.* 219. *A "groat" is a sufficient description of the silver coin of the value of fourpence. Reg.* v. *Connell,* 1 *C. & K.* 190.

*Misdemeanor, imprisonment, (with or without hard labour, and with or without solitary confinement,* 2 *W.* 4, *c.* 34, *s.* 19, (*ante, p.* 501), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding one year,* 2 *W.* 4, *c.* 34, *s.* 7.

*Evidence.*

1. Prove the tendering, uttering, or putting off the sovereign in question, and prove it to be a base and counterfeit sovereign. Where a good shilling was given to a Jew boy for fruit, and he put it into his mouth, under pretence of trying whether it were good, and then taking a bad shilling out of his mouth instead of it, returned it to

the prosecutor, saying that it was not good; this (which is called ringing the changes) was holden to be an uttering within the meaning of the statute 16 *G.* 2, *c.* 28. *R.* v. *Franks*, 2 *Leach*, 736.

2. Prove that the defendaat knew it to be a counterfeit sovereign at the time he uttered it. This, of course, must be done by circumstantial evidence. (*See ante, p.* 122). If, for instance, it be proved that he uttered, either on the same day or at other times, base money of the same description to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question, this will be evidence from which the jury may presume a guilty knowledge. *Per Thompson*, B., *in R.* v. *Whiley*, 2 *Leach*, 983.

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### *Indictment for Uttering Counterfeit Coin, having at the same time Counterfeit Coin in Possession.*

*The same as in the last precedent, to the words* "well knowing the same to be false and counterfeit." *Then proceed thus*]:—and that he the said J. S., at the said time when he so uttered ("*tender, utter, or put off*") the said piece of false and counterfeit coin as aforesaid, then and there had in his possession, besides the said piece of false and counterfeit coin so uttered, one other piece of false and counterfeit coin, resembling ("*resembling, or apparently intended to resemble or pass for*") a piece of the Queen's current silver ("*gold or silver*") coin called a shilling; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, imprisonment, (with or without hard labour, and with or without solitary confinement,* 2 *W.* 4, *c.* 34, *s.* 19, (*ante, p.* 501), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. s.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding two years,* 2 *W.* 4, *c.* 34, *s.* 7, (*ante, p.* 508).

### *Evidence.*

Prove the offence of uttering, as directed *ante, p.* 509; and prove that the defendant at the same time had about him one or more pieces of the counterfeit money specified in the indictment. The guilty knowledge may reasonably be implied from the possession of the other counterfeit coin. A man and woman were indicted for uttering a bad shilling to M. B., they having another bad shilling in their possession at the time. The uttering was by the woman alone, in the absence of the man. It was held by all the Judges, that the man was not liable to be convicted as the actual utterer, although proved to be the associate of the woman on the day of the uttering, and to have had other bad money for the purpose of uttering. And it was also held, that the woman could not be convicted of the second offence, of having other bad money in her possession at the time, on the evidence of her associating with a man not present at the uttering, but having large quantities of bad money about him for the purpose of uttering. *R.* v. *Else*, *R. & R.* 142; *see also R.* v. *Manners*, 7 *C. & P.* 801: *Reg.* v. *Jones*, 9 *C. & P.* 761. But where two per-

sons went to a shop, and one of them went in and uttered a bad piece of money, having no more in her possession, and the other staid outside the shop, having other bad money, it was held that both might be convicted, the uttering and the possession being joint. *R.* v. *Skerrett*, 2 *C. & P.* 427. And in all cases where one of two persons in company utters counterfeit coin, and other counterfeit coin is found on the other, both are guilty of the aggravated offence, if acting in concert, and both knowing of the possession. *Reg.* v. *Gerrish*, 2 *M. & Rob.* 219. *See Reg.* v. *Rogers*, 2 *Mood. C. C.* 85: *Reg.* v. *Hurse*, 2 *M. & Rob.* 360: *Reg.* v. *Williams*, 1 *C. & Mar.* 259: (*post*, *p.* 513).

The giving of a piece of counterfeit coin in charity is not an uttering within the statute, although the party know it to be counterfeit; for there must be some intention to defraud. *R.* v. *Page*, 8 *C. & P.* 122.

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### *Indictment for Uttering twice within Ten days.*

*Proceed as in the precedent, ante, p.* 509, *to the words* "well knowing the same to be false and counterfeit" *inclusive, and then proceed thus*] :—And that the said J. S. afterwards, on the same day, that is to say, on the said third day of August, in the year last aforesaid, [*or* afterwards, and within the space of ten days then next ensuing, to wit, on the sixth day of August, in the year last aforesaid], at the parish aforesaid, in the county aforesaid, one other piece of false and counterfeit coin, resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the Queen's current silver ("*gold or silver*") coin called a shilling, unlawfully, falsely, and deceitfully did utter ("*tender, utter, or put off*") to the said J. N., [*or*, to one G. H.], he the said J. S., at the time when he so uttered the said last-mentioned piece of false and counterfeit coin, then and there well knowing the same to be false and counterfeit; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The double uttering must be charged in one count of the indictment. R.* v. *Tandy*, 2 *Leach*, 835. *See R.* v. *Martin*, 2 *Leach*, 923.

*Misdemeanor.* 2 *Will.* 4, *c.* 34, *s.* 7, (*ante*, *p.* 508). *See the last precedent.*

*On a conviction for two separate offences of uttering, in two counts, one judgment for two years imprisonment, under s.* 7, *is bad. R.* v. *Robinson*, 1 *Mood. C. C.* 413.

### *Evidence.*

Prove the two offences as directed *ante*, *p.* 509; and prove them to have been committed on the same day, or within the space of ten days, according as it is alleged in the indictment.

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### *Indictment for a subsequent Uttering after a previous Conviction.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, [at the general quarter sessions

of the peace, holden at ——, *so continuing the record of the conviction of the first offence, to the end of the judgment inclusive, stating it, however, in the past and not in the present tense; (see ante, p. 90); then proceed thus*] :—as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and after he had been so convicted as aforesaid, to wit, on the third day of August, in the year last aforesaid, at the parish of B., in the county of M., one other piece of false and counterfeit coin, resembling, &c., *as in either of the three last precedents, except that you must charge the offence to have been done* "feloniously." *The previous conviction must be stated with a* prout patet per recordum. *R.* v. *Turner*, 1 *Mood. C.C.* 47. *A conviction under the old law cannot be joined with an offence under the new statute.*

*To commit any of the misdemeanors mentioned in the three preceding cases, after a conviction for any one of those offences respectively, is felony, transportation for life or not less than seven years, or imprisonment, (with or without hard labour, and with or without solitary confinement, 2 W. 4, c. 34, s. 19, (ante, p. 500), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169) ), not exceeding four years. 2 W. 4, c. 34, s. 7, (ante, p. 508).*

### *Evidence.*

According to the order of the averments in the indictment, prove, 1. The previous conviction, by a copy purporting to be signed and certified as a true copy by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer; 2 *W.* 4, *c.* 34, *s.* 9, (*ante*, *p.* 508); 2. the identity of the defendant, (*see post, Part V*); and 3. the subsequent offence, as directed under the three last precedents.

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## HAVING IN POSSESSION THREE OR MORE PIECES OF COUNTERFEIT COIN.

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### *Statute.*

2 *W.* 4, *c.* 34, *s.* 8]—Enacts, that if any person shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England nnd Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years; and if any person so convicted shall afterwards commit the like misdemeanor or crime and offence, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court,

to be transported beyond the seas for life, or for any term nor less than seven years, or to be imprisoned for any term not exceeding four years.

*Indictment.*

*Commencement as ante, p.* 500]—in the county aforesaid, four pieces of false and counterfeit coin, resembling ("*resembling or apparently intended to resemble or pass for*") the Queen's current silver ("*gold or silver*") coin called shillings, unlawfully, falsely, and deceitfully had in his custody and possession, with intent to utter ("*tender, utter, or put off*") the said pieces of false and counterfeit coin, he the said J. S. then and there well knowing the said pieces of false and counterfeit coin to be false and counterfeit: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, imprisonment, (with or without hard labour, and with or without solitary confinement,* 2 *W.* 4, *c.* 34, *s.* 19, (*ante, p.* 500), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169) ), *not exceeding three years.* 2 *W.* 4, *c.* 34, *s.* 8. *This offence, after a previous conviction for the like offence, is felony; transportation for life, or not less than seven years, or imprisonment not exceeding four years.* 2 *W.* 4, *c.* 34, *s.* 8. *An indictment for that offence may be easily framed from this and the last precedent, stating the second offence to have been committed* "feloniously."

*Evidence.*

Prove that the defendant had in his custody or possession three or more pieces of counterfeit gold or silver coin. They will be deemed to be in his custody and possession, if he have them in his personal custody and possession, or knowingly and wilfully have them in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, either for his own use or benefit, or for that of another. 2 *W.* 4, *c.* 34, *s.* 21, (*ante, p.* 500). So also, when pieces of counterfeit coin are found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty under this section. *Reg.* v. *Rogers,* 2 *Mood. C. C.* 85: *Reg.* v. *Williams, C. & Mar.* 259; (*ante, p.* 511). Prove also the defendant's knowledge that the coin was counterfeit, and his intent to utter it. These, of course, can only be proved by circumstances; as, for instance, by evidence of former utterings.

At common law, it was no offence to have possession of counterfeit coin with intent to utter it; *R.* v. *Stewart, R. & R.* 288; *R.* v. *Heath, Id.* 184; but to *procure* it with that intent was a misdemeanor. *R.* v. *Fuller, R. & R.* 308. And proof that the defendant was the coiner was an answer to a charge for the common-law misdemeanor for procuring. 1 *Russ.* 48. But this would not be so under the present statute.

### MAKING, &C. COINING TOOLS.

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*Statute.*

2 *W.* 4, *c.* 34, *s.* 10]—Enacts, that if any person shall knowingly, and without lawful authority, (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly and without lawful excuse (the proof of which excuse shall lie on the party accused) have in his custody or possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the King's current gold or silver coin, or any part or parts of both or either of such sides; or if any person shall, without lawful authority, (the proof whereof shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, (the proof whereof shall lie on the party accused), have in his custody or possession any edger, edging tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the King's current gold or silver coin, such person knowing the same to be so adapted and intended as aforesaid; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin to proceed to make or mend, or buy or sell, or shall, without lawful excuse, to be proved as aforesaid, have in his custody or possession any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used, or to be intended to be used, for or in order to the counterfeiting of any of the King's current gold or silver coin; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

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### *Indictment for making, &c. a Puncheon, &c. for Coining.*

*Commencement as ante, p.* 500]—in the connty aforesaid, one puncheon, ("*any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould*"), in and upon which there was then made and impressed ("*in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress*") the figure ("*figure, stamp, or apparent resemblance*") of one of the sides, ("*of both or either of the sides, or any part or parts of both or either of such sides*") that is to say, the head side of a piece of the Queen's current silver, ("*gold or silver*), commonly called a

shilling*, knowingly, falsely, deceitfully, and feloniously, did make (*"make or mend, or begin or proceed to make or mend, or buy or sell"*); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p. 20.*

*Felony, transportation for life or for not less than seven years, or imprisonment, (with or without hard labour, and with or without solitary confinement, 2 W. 4, c. 34, s. 19, (ante, p. 500), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169) ), not exceeding four years. 2 W. 4, c. 35, s. 10.*

• *These offences are not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1, (ante, p. 69).*

*Evidence.*

Prove that the defendant made, &c., a puncheon, &c., as stated in the indictment; and prove that the instrument in question is a puncheon or other instrument described in the indictment, and included in the statute. The words in the statute, "upon which there shall be made or impressed," &c., apply to the puncheon, which, being convex, bears upon it the figure of the coin; and the words, "which will make and impress," &c., apply to the counter-puncheon, &c., which, being concave, will make and impress. However, although it is more accurate to describe the instruments according to their actual use, they may be described either way. *R.* v. *Lennard,* 1 *Leach,* 85; 1 *East, P. C.* 170. It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin; for the words, "or any part or parts," &c., are introduced into this statute, and consequently the difficulty in *R.* v. *Sutton,* 2 *Str.* 1074; *Hardw.* 370, where the instrument was capable of making the sceptre only, cannot now occur. And on an indictment for making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould, and a part of the impression, though he had not completed the entire impression. *R.* v. *Foster,* 7 *C. & P.* 495. It is not necessary to prove, under this branch of the statute, the knowledge or intent of the defendant; for the mere similitude is treated by the legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question. *R.* v. *Ridgeley,* 1 *East, P. C.* 172.

Where the defendant employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings; and the die-sinker, suspecting fraud, informed the authorities at the Mint, and under their directions made the die for the purpose of detecting the prisoner; it was held, that the die-sinker was an innocent agent, and the defendant rightly convicted as a principal under 2 *W.* 4, *c.* 34, *s.* 10. *Reg.* v. *Bannon,* 2 *Mood. C. C.* 309; 1 *C. & K.* 295.

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*Indictment for having a Puncheon, &c., in Possession.*

*Proceed as in the last precedent, to the Asterisk*, and then thus*]:— knowingly, falsely, deceitfully, and feloniously, and without lawful

excuse, had in his custody and possession; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *An indictment which charged that the defendant feloniously had in his possession a mould "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held bad on demurrer, as not sufficiently shewing that the impression was on the mould at the time when he had it in his possession. Reg.* v. *Richmond,* 1 *C. & K.* 240. *As to the venue, see ante, p.* 20.

*Felony.* 2 *W.* 4, *c.* 34, *s.* 10, (*ante, p.* 514). *See the last precedent.*

*Evidence.*

Prove the custody or possession, that is, that the defendant had the instrument either in his personal custody or possession, or, knowingly and wilfully, in some dwelling-house or building, lodging, apartment, field, or other place, open or inclosed, whether belonging to himself or not, and whether the instrument was used for his own use or benefit, or for that of another. 2 *W.* 4, *c.* 34, *s.* 21, (*ante, p.* 500): *see Reg.* v. *Rogers,* (*ante, p.* 513). It must also be proved that the puncheon or instrument is such as is specified in the indictment, and included in the statute. Where the prisoner was indicted for having in his possession a mould on which was impressed a resemblance of the obverse side of a shilling, it was held that, in order to convict, the jury must be satisfied, that, at the time he had it in his possession, the *whole* of the obverse side of the shilling was impressed on the mould. *R.* v. *Foster,* 7 *C. & P.* 494. The lawful excuse, if any, must be proved by the defendant. 2 *W.* 4, *c.* 34, *s.* 10, (*ante, p.* 514).

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*Indictment for making, &c., a Collar.*

*Commencement as ante, p.* 500]—in the county aforesaid, one collar ("*any edger, edging tool, collar, instrument, or engine*") adapted and intended for the working of coin round the edges with grainings ("*letters, grainings, or other marks or figures*") apparently resembling those on the edges of a piece of the Queen's current gold, ("*gold or silver*") coin, called a sovereign, falsely, deceitfully, and feloniously, and without lawful authority, did make, ("*make or mend, or begin or proceed to make or mend, or buy or sell, or without lawful excuse, the proof whereof shall lie on the party accused, have in his custody or possession*"), he, the said J. S. then and there well knowing the same to be so adapted and intended as aforesaid; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 20. *From this and the last precedent, an indictment for having possession of such tools may be easily framed.*

*Felony.* 2 *W.* 4, *c.* 34, *s.* 10, (*ante, p.* 514). *See the precedent ante, p.* 523.

*Evidence.*

The evidence upon this indictment will be the same as in the two last respectively, except that it must also be proved that the defend-

ant knew the instrument to be adapted and intended for the making of coin round the edge. This is a new provision, and was substituted for the words, "not of common use in any trade," in the former statute, upon which much difficulty arose. *See R.* v. *Moore*, 2 *C. & P.* 235.

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### *Indictment for making, &c., a Press, &c., for Coining.*

*Commencement as ante, p.* 500]—in the county aforesaid, one press for coinage ("*any press for coinage, or any cutting engine for cutting, by force of a screw or any other contrivance, round blanks out of gold, silver, or other metal*") falsely, deceitfully, and feloniously, and without lawful authority, did make ("*make or mend, or begin or proceed to make or mend, or buy or sell, or have, without lawful excuse, the proof whereof shall lie on the party accused, in his custody or possession*"), he the said J. S. then and there well knowing such press to be a press for coinage; [*or* such engine to have been used, or to be intended to be used, for and in order to the counterfeiting of the Queen's current gold and silver coin]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 20. *From this and the precedent, ante, p.* 515, *an indictment may be easily framed for having possession of a coining press, or instrument for cutting.*

*Felony.* 2 *W.* 4, *c.* 34, *s.* 10, (*ante, p.* 514). *See the precedent, ante, p.* 515.

### *Evidence.*

The evidence will be the same as under the last precedent. It must be observed, that in this section there is no qualification applicable to the coining press, though there is as to the cutting engine in the same branch of the section. In *R.* v. *Bell*, 1 *East, P. C.* 169, *Fost.* 430, it was holden that a coining press used to make *louis d'ors* was not within the meaning of similar words in the statute 8 & 9 *W.* 3, *c.* 26, contrary to the opinion of *Ryder*, C. J., and *Foster*, J., in which Lord *Mansfield* concurred.

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## CONVEYING COINING TOOLS AND COINS OUT OF THE MINT.

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### *Statute.*

2 *W.* 4, *c.* 34, *s.* 11]—Enacts, that if any person shall, without lawful authority, the proof whereof shall lie upon the party accused, knowingly convey out of any of his Majesty's mints, any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging tool, collar, instrument, press, or engine, used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, every such offender shall, in England and Ireland, be guilty of felony, and

in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

*Indictment.*

*Commencement as ante, p.* 500]—in the county aforesaid, one puncheon ("*any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging tool, collar, instrument, press, or engine, or any useful part of the several matters aforesaid*") used and employed in and about the coining of coin, [*or* ten pieces of the Queen's current gold coin, ("*any coin, bullion, metal, or mixture of metals*"),] without lawful authority knowingly, falsely, deceitfully, and feloniously did convey out of her Majesty's mint; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 20.

*Felony.* 2 *W.* 4, *c.* 34, *s.* 11. *See the precedent, ante, p.* 515.

*Evidence.*

Prove that the defendant conveyed the article charged in the indictment out of the mint. If a tool, &c., it must be shewn to be a tool used in coining. The proof of the lawful authority is, by the statute, cast upon the defendant. 2 *W.* 4, *c.* 34, *s.* 11.

OTHER OFFENCES RELATING TO THE COIN.

The following statutes apply to other offences relating to coin:—

2 *W.* 4, *c.* 34, *s.* 12—*Copper Coin*]—Enacts, that if any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the King's current copper coin; or if any person shall knowingly, and without lawful authority, (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse, (the proof of which excuse shall lie on the party accused), have in his custody or possession any instrument, tool, or engine adapted and intended for the counterfeiting any of the King's current copper coin; or if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current copper coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years; and if any person shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended

**to resemble or pass for, any of the King's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding one year.**

37 *G.* 3, *c.* 126, *s.* 2—*Counterfeiting Foreign Coin.*]—And whereas the practice of counterfeiting foreign gold and silver coin, and the bringing into this realm, and uttering within the same, false and counterfeit foreign gold and silver coin, and particularly pieces of gold coin commonly called *louis d'ors*, and pieces of silver coin commonly called *dollars*, hath of late greatly increased; and it is expedient that provision should be made more effectually to prevent the same: be it enacted, that, if any person or persons shall, from and after the passing of this act, make coin, or counterfeit any kind of coin, not the proper coin of this realm, nor permitted to be current within the same, but resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, such person or persons offending therein shall be deemed and adjudged to be guilty of felony, and may be transported for any term of years not exceeding seven years. *See* 1 *East, P. C.* 161.

Sect. 3—*Importing Foreign Coin*]—Enacts, that if any person or persons shall, from and after the passing of this act, bring into this realm any such false or counterfeit coin as aforesaid, resembling, or made with intent to resemble or look like, any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, to the intent to utter the same within this realm, or within any dominions of the same, all and every such person or persons shall be deemed and adjudged to be guilty of felony, and may be transported for any term of years not exceeding seven years. *See* 1 *East, P. C.* 177.

Sect. 4—*Uttering Counterfeit Foreign Coin*]—Enacts, that if any person or persons shall, from and after the passing of this act, utter or tender in payment, or give in exchange, or pay or put off, to any person or persons, any such false or counterfeit coin as aforesaid, resembling, or made with intent to resemble or look like, any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, and shall be thereof convicted, every person so offending shall suffer six months' imprisonment, and find sureties for his or her good behaviour for six months more, to be computed from the end of the said first six months; and if the same person shall afterwards be convicted a second time for the like offence of uttering, or tendering in payment, or giving in exchange, or paying or putting off, any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, such person shall, for such second offence, suffer two years' imprisonment, and find sureties for his or her good behaviour for two years more, to be

computed from the end of the said first two years; and if the same person shall afterwards offend a third time, in uttering or tendering in payment, or giving in exchange, or paying or putting off, any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, and shall be convicted of such third offence, he or she shall be adjudged to be guilty of felony, without benefit of clergy.

Sect. 5—*Proof of Conviction*]—Enacts, that if any person shall be convicted of uttering or tendering any such false or counterfeit coin as aforesaid, and shall afterwards be guilty of the like offence in any other county, city, or place, the clerk of the assize or clerk of the peace for the county, city, or place, where such former conviction shall have been had, shall, at the request of the prosecutor, or any other on his Majesty's behalf, certify the same by a transcript, in few words, containing the effect and tenor of such conviction; for which certificate two shillings and sixpence and no more shall be paid, and such certificate, being produced in court, shall be sufficient proof of such former conviction.

An indictment for any of the offences here enumerated may readily be framed from some of the foregoing precedents.

## Sect. 3.

### SEDITION AND BLASPHEMY, &c.

*Statute.*

38 *G.* 3, *c.* 78, *s.* 9—*Affidavits of Proprietorship of Newspapers*]—Enacts, that all such affidavits and affirmations as aforesaid shall be filed and kept in such manner as the said commissioners shall direct, and the same, or copies thereof, certified to be true copies, as hereinafter is mentioned, shall respectively, in all proceedings, civil and criminal, touching any newspaper, or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter, or thing contained in any such newspaper or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or informations as are hereby required to be therein set forth, against every person who shall have signed or sworn or affirmed such affidavits or affirmations, and shall also be received and admitted, in like manner, as sufficient evidence of the truth of all such matters against all and every person who shall not have signed, or sworn, or affirmed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper or other paper, unless the contrary shall be satisfactorily proved: provided always, that, if any such person or persons respectively, against whom any such affidavit or affirmation, or any copy thereof, shall be offered in evidence, shall prove that he, she, or they hath or have signed, sworn, or affirmed, and delivered to the said commissioners or such officer

as aforesaid, previous to the day of the date or publication of the newspaper or other such paper as aforesaid to which the proceedings, civil or criminal, shall relate, an affidavit or affirmation that he, she, or they, hath or have ceased to be the printer or printers, proprietor or proprietors, or publisher or publishers of such newspaper or other such paper as aforesaid, such person or persons shall not be deemed, by reason of any former affidavit or affirmation so delivered as aforesaid, to have been the printer or printers, proprietor or proprietors, or publisher or publishers of such paper after the day on which such last-mentioned affidavit or affirmation shall have been delivered to the commissioners or their officer as aforesaid.

Sect. 10—*Names and Abode of Printer to be published*]—Enacts, that, in some part of every newspaper, or other such paper as aforesaid, there shall be printed the true and real name and names, addition and additions, and place and places of abode, of the printer and printers, and publisher and publishers, of the same, and also a true description of the place where the same is printed; and in case any person or persons shall knowingly and wilfully print or publish, or cause to be printed or published, any such newspaper or other paper as aforesaid, not containing the particulars aforesaid, and every of them, every such person shall forfeit and lose the sum of one hundred pounds; and proof made in manner herein mentioned, in any proceeding to recover the same, that the party proceeded against is a printer or publisher of a newspaper or other such paper so printed or published as aforesaid, shall be deemed and taken to be proof that such party is a person wilfully and knowingly printing or publishing, or causing the same to be printed or published, unless he shall satisfactorily prove the contrary thereof.

Sect. 11—*Not necessary to prove Purchase of Paper*]—Enacts, that it shall not be necessary, after any such affidavit or affirmation, or a certified copy thereof, shall have been produced in evidence as aforesaid against the persons who signed and made such affidavit, or are therein named, according to this act, or any of them, and after a newspaper or other such paper as aforesaid shall be produced in evidence, intituled in the same manner as the newspaper or other paper mentioned in such affidavit or copy is intituled, and wherein the name or names of the printer and publisher, or printers and publishers, and the place of printing, shall be the same as the name or names of the printer, publisher, or printers and publishers, and the place of printing mentioned in such affidavit or affirmation, for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper or paper to which such trial relates, was purchased at any house, shop, or office, belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold.

Sect. 14—*Copies of Affidavits, &c., to be sufficient*]—Whereas, in many cases, it may be productive of public inconvenience to require that the commissioners or officers before whom such affidavits or

affirmations as are hereinbefore mentioned are made, should be required personally to attend, in order to prove, upon the trial of any action, prosecution, suit, indictment, information, or in any other proceeding, that the parties signing, swearing, or affirming, and delivering such affidavit or affidavits, affirmation or affirmations, did swear or affirm the same in the presence of and did deliver the same to such commissioners and officers before and to whom the same shall have been sworn, affirmed, or delivered respectively; be it enacted, that in all cases, a copy of any such affidavit or affirmation, certified to be a true copy under the hand or hands of one or more of the commissioners or officers in whose possession the same shall be, shall, upon proof made that such certificates have been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, or officer or officers, be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and such copies, so produced and certified, shall also be received as evidence that the affidavit or affirmation of which they purport to be copies have been sworn or affirmed according to this act, and shall have the same effect for the purposes of evidence, to all intents whatsoever, as if the original affidavits or affirmations of which the copies so produced and certified shall purport to be copies, had been produced in evidence, and been proved to have been duly so certified, sworn, and affirmed, by the person or persons appearing by such copy to have sworn or affirmed the same as aforesaid.

Sect. 17—*Papers deposited to be delivered out by Commissioners*]—Enacts, that, from and after the first day of July, one thousand seven hundred and ninety-eight, the printer or publisher of every newspaper, or other such paper as aforesaid, shall, upon every day upon which the same shall be published, or within six days after, deliver to the commissioners of stamps at their head office, or to some officer to be appointed by them to receive the same, and whom they are hereby required to appoint for that purpose, one of the papers so published upon each such day, signed by the printer or publisher thereof, in his handwriting, with his name and place of abode, and the same shall be carefully kept by the said commissioners or such officer as aforesaid in such manner as the said commissioners shall direct; and such printer or publisher shall be entitled to demand and receive from the commissioners, or such officers, once in every six days, the amount of the ordinary price of the newspapers or other papers so delivered; and in every case in which the printer and publisher of such newspaper or other paper as aforesaid shall neglect to deliver one such newspaper, or other paper, in the manner hereinbefore directed, such printer and publisher shall for every such neglect respectively forfeit and lose the sum of one hundred pounds; and in case any person or persons shall make application to the commissioners or such officer as aforesaid, in order that such newspaper or other paper so signed by the printer and publisher may be produced in evidence in any proceeding, civil or criminal, the said commissioners or such officer shall, at the expense of the party applying, at any time within two years from the publication thereof, either cause the same to be produced in the

court in which the same is required to be produced, and at the time when the same is required to be produced, or shall deliver the same to the party applying for it, taking according to their discretion reasonable security, at his expense, for the returning the same to the said commissioners for such officer; and in case, by reason that the same shall have been previously required by any other person to be produced in any court, or have been previously delivered to any other person for the like purpose, the same cannot be produced at the time required, or be delivered according to such application, in such case the said commissioners, or such their officer, shall cause the same to be produced, or shall deliver the same as soon as they are enabled to do so.

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## *Indictment for a Seditious Libel.*

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. H., late of the parish of B., in the county of M., clerk, being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said lord the King, and to his administration of the government of this kingdom and the dominions thereunto belonging, and wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontents and seditions amongst his Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said Majesty's subjects from his said Majesty, [and cause it to be believed that divers of his Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops, in the province. colony, or plantation of the Massachussetts Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his Majesty's subjects in the said province, colony, or plantation, to resist and oppose his Majesty's government], on the eighth day of June, in the fifteenth year of the reign of our sovereign lord George the Third, with force and arms, at the parish aforesaid, in the county aforesaid, wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning [his said Majesty's government and the employment of his troops], according to the tenor and effect following; that is to say: "King's Arms Tavern, Cornhill, June 7, 1775. At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly [murdered by the King's (meaning his said Majesty's) troops at Lexington and Concord, in the province of Massachussetts, (meaning the said province, colony, or plantation of the Massachussetts Bay, in New England, in America), on the nineteenth of last April: which sum being immediately collected, it was thereupon resolved, that Mr. H. (meaning himself, the said J. H.) do pay to-

morrow into the hands of Messrs. B. & C., on account of Dr. F., the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above mentioned purpose. J. H." (meaning himself, the said J. H.)]; in contempt of our said lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity." *There were other counts charging that the defendant "printed and published, and caused and procured to be printed and published" in several newspapers, the same libel; and other counts, charging the printing and publishing of part of the same libel, setting it out to the words "the nineteenth of last April," inclusive; and lastly, a count charging the defendant with having written and published another but similar libel. This was the case of R.* v. *Horne, Cowp.* 672; *it was in fact an information ex officio: but I have given it the shape of an indictment, to make it conformable with the other precedents in the volume. The defendant himself moved in arrest of judgment, and made several objections, the principal of which was, that it was not averred that the employment of the troops was by the King's authority; but the court, after much consideration, declared themselves clearly of opinion that the information was sufficient, See also R.* v. *Burdett,* 4 *B. & Ald.* 344.

*The punishment for a seditious libel is fine and imprisonment. The stat.* 60 *G.* 4, *c.* 8, *s.* 4, *which inflicted banishment for the second offence, is repealed.* 11 *G.* 4 *&* 1 *W.* 4, *c.* 73, *s.* 1. *See* 6 *&* 7 *Vict. c.* 96, *post. By* 11 *G.* 4 *&* 1 *W.* 4, *c.* 73, *s.* 2, *bonds given by proprietors of newspapers are conditioned to pay the fines imposed on prosecutions. Offences of this nature are not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

We shall now proceed to make a few observations on what is to be deemed sedition, and on the form of the indictment for that offence.

*First,* as to what is to be deemed sedition.—Political writings and words may be classed under three hands: those which are overt acts of treason; those which are seditious; and those which are allowable and justifiable. We have seen what political writings and words amount to overt acts of high treason, (*ante, p.* 490). On the other hand, a man may lawfully discuss and criticise the measures adopted by the Queen and her ministers for the government of the country. provided he do it fairly, temperately, with decency and respect, and without imputing to them any corrupt or improper motive. *See R.* v. *Lambert & Perry,* 2 *Camp.* 398. All political writings and words between these extremes, may be deemed seditious. As, for instance, if a man curse the Queen, wish her ill, give out scandalous stories concerning her, (*see R.* v. *Harvey,* 2 *B. & C.* 257; 3 *D. & R.* 464), or do any thing that may lessen her in the esteem of her subjects, may weaken her government, or may raise jealousies between her and her people; or, if he deny the Queen's right to the throne, in common and unadvised discourse, (for if it be by advisedly speaking, it amounts to *præmunire*); all these are sedition. 4 *Bl. Com.* 423. In *R.* v. *Tutchin* (5 *St. Tr.* 532; *Holt,* 424), Lord *Holt* said, that "if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this

has always been looked upon as a crime, and no government can be safe unless it be punished." And Lord *Ellenborough*, in *R.* v. *Cobbett*, (*Holt on Libel*, 114; *Stark. on Libel*, 522), said, that, if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, &c. are punishable. And whether the defendant really intended, by his publication, to alienate the affections of the people from the government, or not, is not material; if the publication be calculated to have that effect, it is a seditious libel. *R.* v. *Burdett*, 4 *B. & Ald.* 95; *R.* v. *Harvey*, *supra*.

*Secondly*, as to the form of the indictment.—As to the mere formal part, it is sufficient to refer to the precedent, *ante*, *p.* 523.

1. The indictment must charge a publication; composing or writing a libel merely, does not seem to be an offence, unless the libel be afterwards published. *See R.* v. *Burdett*, 4 *B. & Ald.* 95. But if a man write a libel in the county of L., with intent to publish it, and afterwards publish it in the county of M., he may it seems be indicted for a misdemeanor in either county. *Id., by three Judges, Bayley*, J., *dub.*

2. Such part of the publication as is libellous, or as the prosecutor chooses to set out, must be set out correctly. *Wright* v. *Clement*, 3 *B. & Ald.* 503: *Tabart* v. *Tipper*, 1 *Camp.* 352: *Cartwright* v. *Wright*, 1 *D. & R.* 230. (*See ante*, *p.* 102). If parts of the publication be selected, they must be set forth thus: "in a certain part of which said ———— there were and are contained certain false, wicked, malicious, scandalous, seditious, and libellous matters, of and concerning, &c., "according to the tenor and effect following; that is to say:" —"And in a certain other part," *&c. &c. See* 1 *Camp.* 350. If the libel be in a foreign language, it must be set out in such language, verbatim, together with a correct translation. *Zenobio* v. *Axtel*, 6 *T. R.* 162.

3. And besides setting out the libellous passages of the publication, the indictment must also contain such averments and innuendos as may be necessary to render it intelligible, and its application to the Queen or her government, &c., evident. When the statement of an extrinsic fact is necessary in order to render the libel intelligible, or to shew its libellous quality, such extrinsic fact must be averred in the introductory part of the indictment; but where it is necessary merely to explain a word by reference to something which has preceded it, this is done by an innuendo. And an innuendo can explain only in cases where something already appears upon the record to ground the explanation; it cannot, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. *See* 2 *Salk.* 513; *Cowp.* 684. Thus, for instance, in an action on the case against a man for saying of another "*he has burnt my barn*," the plaintiff cannot, by way of innuendo, say "*meaning my barn full of corn; Barham's case*, 4 *Co.* 20 *a.*; because this is not an explanation derived from anything which preceded it on the record, but from the statement of an extrinsic fact which had not previously been stated. But if, in the introductory part of the declaration, it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, he had spoken the above words of the plaintiff, an innuendo of its

being the barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete. So, in an action for the words "*He is a thief,*" you cannot explain the defendant's meaning in the use of the word "*he,*" by an innuendo "*meaning the said plaintiff,*" or the like, unless something appear previously upon the record to ground that explanation; but if you had previously charged the words to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for, when it is alleged that the defendant said of the plaintiff "*He is a thief,*" this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "*he.*" *See* 1 *Rol. Abr.* 83, *pl.* 7, 86, *pl.* 7; 2 *Rol. Rep.* 244; *Cro. Jac.* 126, 39; 1 *Sid.* 52; 2 *Str.* 934; 1 *Saund.* 242, n. 3; *Goldstein* v. *Foss,* 9 *D. & R.* 197, 6 *B. & C.* 154: *Clement* v. *Fisher,* 1 *Mann. & Ryl.* 281, 7 *B. & C.* 459: *Alexander* v. *Angle,* 1 *C. & J.* 143: *Tomlinson* v. *Brittlebank,* 4 *B. & Adol.* 630; 1 *Nev. & M.* 455: *Sweetapple* v. *Jesse,* 5 *B. & Adol.* 27; 2 *Nev. & M.* 36: *Curtis* v. *Curtis,* 10 *Bing.* 447; 4 *M. & Scott,* 337: *Slowman* v. *Dutton,* 10 *Bing,* 402; 4 *M. & Scott,* 174: *Day* v. *Robinson,* 1 *Ad. & Ell.* 554; 4 *Nev. & M.* 884. In *R.* v. *Tutchin,* 5 *St. Tr.* 532, 590, one part of the libel was thus: "The mismanagements of the *navy* have been a greater tax upon the merchants than the duties raised by parliament;" in order to explain what was meant by the navy, the introductory part of the information charged the libel to have been written "of and concerning the royal navy of this kingdom, and the government of the said navy;" and when, in stating the libel, it came to the word "navy," it explained it by an innuendo, thus: "meaning the royal navy of this kingdom;" which being coupled with the averment in the introductory part of it, made the sense and the charge complete. In *R.* v. *Matthews,* 9 *St. Tr.* 682, the words of the libel were these: "From the solemnity of the Chevalier's birth, and if hereditary right be any recommendation, he has that to plead in its favour:" it was there objected—What Chevalier? who is he? what recommendation? and to what? But in the introductory part of the information the libel was charged to have been written "of and concerning the Pretender, and of and concerning his right to the crown of Great Britain;" and it was holden that the innuendos in the body of the libel, explaining the words "Chevalier," &c., to mean the Pretender, and his hereditary right to the crown of Great Britain, when connected with the averment in the introductory part, of its being written "of and concerning the Pretender and his right to the crown of Great Britain," were a sufficient explanation to make good the charge. But where the words or libel are in the second person, and the slander is spoken or the libel is directed to the party slandered or libelled, and it is so alleged in the indictment—as, where a declaration charges that the defendant, in a discourse with the plaintiff, said to him, "*You are a thief,*"—it is unnecessary to aver that they were spoken or written of and concerning the plaintiff; nor is there any need of an innuendo, for it is plain enough without it that "*you*" means the plaintiff. *Skutt* v. *Hawkins,* 2 *Rol. Rep.* 243, 244; *and see* 1 *Rol. Abr.* 85, *pl.* 8.

*See two precedents of indictments for seditious libels,* 4 *Went.* 199, 200.

## *Evidence on the part of the Prosecution.*

*On the Eighth Day of June, &c.*]—The day on which the libel is alleged to have been written and published is not material, and need not be proved as laid; but a variance between the indictment and evidence, in any dates alleged and mentioned in the libel, would be fatal. (*See ante, p.* 102).

*At the parish aforesaid, in the County aforesaid.*]—The offence of course must be proved to have been committed in the county in which the venue is laid. If a letter containing the libel reach the party to whom it is directed in the proper county, *see R.* v. *Johnson,* 7 *East,* 95, even though addressed to him at a place out of the county, *R.* v. *Watson,* 1 *Camp.* 215, or even if a sealed letter, containing the libel, be put into the post-office in the proper county, *R.* v. *Burdett,* 4 *B. & Ald.* 95; *by three Judges, Bayley,* J., *dub.*, it is a sufficient publication of the libel in that county: and in the last case, the three judges held that if a man write and compose a libel in L., with intent to publish it, and afterwards publish it in M., he may be indicted for a misdemeanor in either county. But in *R.* v. *Watson,* 1 *Camp.* 215, Lord *Ellenborough* held that the post-mark of a particular place within the county, upon a letter containing the libel, was no evidence of a publication in that county: for the post-mark might be forged. But it would seem that post-marks are evidence that the letters on which they are were in the office to which the post-mark belongs, at the date thereby specified. *See R.* v. *Plumer, R. & R.* 264: *R.* v. *Johnson,* 7 *East,* 65: *Warren* v. *Warren,* 1 *C., M., & R.* 150, 4 *Tyrw.* 850.

*Wickedly, maliciously, and seditiously.*]—The malice, &c., may be inferred from the libel itself, without any extrinsic evidence of it. *R.* v. *Creevey,* 1 *M. & Sel.* 273, 282: *R.* v. *Lord Abingdon,* 1 *Esp.* 226. So, evidence of the defendant's having published other copies of the same libel, *Plunkett* v. *Cobbett,* 5 *Esp.* 136, or other libels, *R.* v. *Pearce, Peake,* 75, provided they expressly refer to the subject of the libel set out in the indictment, *Finnerty* v. *Tipper,* 2 *Camp.* 72, is receivable, in order to prove the malicious or seditious intent. *See Chubb* v. *Westley,* 6 *C. & P.* 436.

*Did write and publish, &c.*]—Upon a count charging the defendant with having composed, printed, and published a libel, proof that he composed and published it, *R.* v. *Williams,* 2 *Camp.* 646, or even that he only published it, *R.* v. *Hunt,* 2 *Camp.* 583, will be sufficient to maintain it. And proof that he composed it in the county of L., and published it in the county of M., will maintain a count laying the offence in the county of L. *R.* v. *Burdett,* 4 *B. & Ald.* 95: *Bayley,* J., *dub.* But a publication must be proved.

The publication may be, by selling the libel, distributing it gratis, reading it to others, (if he knew the tendency of it before), or by sending it and having it delivered to another person, or even to the party libelled by it. *See Bac. Abr., Libel,* (B. 2); 1 *Hawk. c.* 73, *s.* 11. So, evidence of the defendant's procuring another person to publish the libel, is sufficient to maintain a count charging the defendant with having published it; and therefore evidence of the libel's being purchased in a bookseller's shop, or at a newspaper office, or the office of a news-vender, of a servant there, in the course of business, will maintain a count, charging the master with having

published it, 4 *Bac. Abr.*, *Libel*, (B. 2); *R.* v. *Almond*, 5 *Burr.* 2686, even although it be proved that the master was not privy to it. *R.* v. *Walter*, 3 *Esp.* 21 : *R.* v. *Gutch*, *M.* & *M.* 433 : *Att.-Gen.* v *Siddon*, 1 *C.* & *J.* 220. *But see now the* 6 & 7 *Vict. c.* 96, *s.* 7, *post.*
The delivery of a newspaper to the officer of the stamp-office is a sufficent publication to sustain an indictment for a libel in that paper, inasmuch as the officer would at all events have an opportunity of reading the libel himself. *R.* v. *Amphlitt*, 6 *D.* & *R.* 126; 4 *B.* & *C.* 35. And if the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, though there be no express evidence that he authorized the printing or publishing. *R.* v. *Beare*, 1 *Ld. Raym.* 414 : *Lamb's case*, 9 *Rep.* 59 : *Reg.* v. *Lovett*, 9 *C.* & *P.* 462.

Where the libel is contained in a newspaper, and the defendant is indicted for having printed and published it—in order to prove the defendant to be printer, publisher, or proprietor of the newspaper, get a certified copy of the usual affidavit from the stamp-office, (which mentions the names and places of abode of the printer, publisher, and proprietors of the paper, the name of the paper, and the place where it is printed); and if the newspaper containing the libel be intituled in the same manner as that mentioned in the affidavit, and the names of the printer and publisher, and the place of printing be the same as is mentioned in the affidavit, these will be sufficient evidence (conclusive evidence against the person or persons who signed the affidavit, and *primâ facie* evidence against others therein mentioned, unless the contrary be satisfactorily proved) of a publication by the persons therein described as printer and publisher, &c.; without proving that the newspaper in question was purchased at any place belonging to, or occupied by them or their servants. 38 *G.* 3, *c.* 78, *s.* 11, 9 ; *Mayne* v. *Fletcher*, 4 *Man.* & *Ry.* 311 ; 9 *B.* & *C.* 382. *See R.* v. *Hunt*, *Ib. n.* This certified copy, upon being proved to have been signed by the person who made it, is evidence not only of the contents of the affidavit, but also of its having been duly sworn by the persons appearing by this copy to have sworn the same. 38 *G.* 3, *c.* 78, *s.* 14. Also, by the same statute, the printer or publisher of every newspaper is obliged to deliver at the stamp-office one of the papers so published, signed by him with his name and place of abode; and the commissioners, upon any persons applying, shall either produce the same in evidence or give it to such persons for that purpose, upon receiving reasonable security for its being returned. 38 *G.* 3, *c.* 78, *s.* 17. *See* 10 *East*, 94; 2 *Camp.* 99, 100. These two sections are distinct, and either mode of proof may be adopted. 9 *B.* & *C.* 384 : 4 *Man.* & *Ry.* 313. The provisions of this statute are extended to certain pamphlets and papers containing news, &c., by stat. 60 *G.* 3, *c.* 9.

*A certain false and seditious Libel.*]—The libel itself must be produced in evidence, and must correspond in substance with the indictment. (*See ante*, p. 102). If the libel be in a foreign language, and be set out in that language, together with a translation, (*see ante*, *p.* 525), the translation must be proved to be correct. *R.* v. *Peltier*, 2 *Sel. N. P.* 1048.

*Meaning his said Majesty.*]—In strictness, all the innuendos must be proved by some persons acquainted with the matters of the libel, and who can swear that they understand such and such words to mean so and so, or to have reference to such and such persons, things, or facts, as described by the innuendo. In many cases, however, the truth of the innuendo appears so evident from the context of the libel itself, that further proof is deemed unnecessary, and it is left to the jury upon a consideration of the libel alone.

*Evidence for the Defendant.*

The defendant may prove that he did not write or publish the libel at all; or he may contend that the publication is not libellous; or that he was justified in publishing it.

1. He may prove that he was not concerned in the writing or publishing of the libel in question; and in the case of a newspaper, he may prove that he is neither printer, publisher, nor proprietor of it, nor otherwise interested or concerned in it, provided he have not signed the affidavit deposited at the stamp-office. He may also prove that he was a mere innocent agent in the publication; as, for instance, that he carried and delivered the letter containing the libel, without knowing its contents, or delivered one paper by mistake for another, (4 *T. R.* 127, 128), or the like. He may also, where a presumptive case of publication, by the act of any other person by his authority, has been established, prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part. 6 *&* 7 *Vict. c.* 96, *s.* 7; but the act does not say expressly whether such evidence shall be a complete defence, or go in mitigation of punishment only. But it is not competent to him to prove that a paper similar to that for the publication of which he is prosecuted was published on a former occasion by other persons who have never been prosecuted for it. *R.* v. *Holt*, 4 *T. R.* 436.

2. He may prove that the writing in question is not libellous; and for that purpose a defendant has been allowed to give in evidence other passages in the same newspaper or publication, plainly referring to the subject of the libel in question, or fairly connected with it, though disjoined from it by other matter, and in a different type, in order to prove that his intention was not such as was imputed to him by the prosecution, or that the passage in question would not fairly bear the construction attempted to be given to it. *R.* v. *Lambert & Perry*, 2 *Camp.* 400.

3. He may shew that he was justified in publishing the matter alleged to be libellous. As, for instance, that it formed part of a speech delivered by him as a member of parliament; (*see* 4 *H.* 1, *c.* 8; 1 *W. & M. st.* 2, *c.* 2); but this privilege extends only to his speaking in the house; for if he afterwards publish his speech, he is amenable for it in the same manner as any other person. *R.* v. *Creevy*, 1 *M. & Sel.* 273: *R.* v. *Lord Abingdon*, 1 *Esp.* 226. Nor is it any defence in law to an action or indictment for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by order of the house, published by the defendant: and

that the House heretofore resolved, declared, and adjudged, "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary, or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it." *Stockdale* v. *Hansard*, 9 *Ad. & Ell.* 1; 2 *Per. & D.* 1.

So, he may prove that the matter alleged to be libellous was contained in a petition to parliament, and published to its members only, or contained in articles of the peace, or in some other regular proceeding in a court of justice, 1 *Hawk. c.* 73, *s.* 8, or the like, *See Fairman* v. *Ives*, 1 *D. & R.* 252: *R.* v. *Lee*, 5 *Esp.* 123: *M'Gregor* v. *Thwaites*, 3 *B. & C.* 24; 5 *Dowl. & Ry.* 447.

So, he may prove that it is a fair report of proceedings in a court of justice. *See Lewis* v. *Walter*, 2 *B. & Ald.* 605: *Chalmers* v. *Payne*, 2 *C. M. & R.* 156. The publication of the history of a trial, consisting of the facts of the case, and if the law of the case, as applied to those facts, is lawful. Counsel in the discharge of their duty, and in matters relevant to the issue, may make observations injurious to individuals; *Hodgson* v. *Scarlett*, 1 *B. & Ald.* 232; but the publication of such slanderous matter is not justifiable, unless it be shewn that it was published for the purpose of giving the public information, which it was fit and proper for them to receive, and that it was warranted by the evidence. *Flint* v. *Pike*, 6 *Dowl. & R.* 528; 4 *B. & C.* 473. In the publication of evidence given on a trial, the evidence itself, and not the result of evidence, should be given. *Lewis* v. *Walter*, 4 *B. & Ald.* 606. This, however, must not be considered a justification or excuse in all cases. For instance, in the course of a trial it may become necessary for the purposes of justice to hear or read matter of a scandalous, blasphemous, or indecent nature; yet it is not lawful, under the pretence of publishing that trial, to re-utter or circulate such matter. *R.* v. *Carlile*, 3 *B. & Ald.* 167; *and see* 1 *M. & Sel.* 281; *per Bayley*, J. And the same as to the reports of proceedings (particularly ex parte proceedings) before magistrates. *See R.* v. *Fisher*, 2 *Camp.* 563: *R.* v. *Fleet*, 1 *B. & A.* 379: *Duncan* v. *Thwaites*, 5 *D. & R.* 447; 3 *B. & C.* 583.

Before the recent statute, 6 & 7 *Vict. c.* 96, the defendant was in no case allowed to prove the truth of the libel, in justification or excuse of his having published it; *R.* v. *Burdett*, 4 *B. & Ald.* 95; or even in extenuation of punishment. *R.* v. *Burdett*, *Id.* 314: *R.* v. *Halpin*, 9 *B. & C.* 65. *See Doug.* 387; *R.* v. *Grant*, 4 *B. & Ad.* 1081. But now, by the 6th section of the above statute, the defendant is permitted, in addition to the plea of not guilty, to plead specially the truth of the matters charged, in the same manner as in an action for defamation, and further to allege that it was for the public benefit that they should be published, and the particular fact or facts by reason whereof it was for the public benefit that they should be published; to which plea the prosecutor may reply generally, denying the whole thereof; and if after such plea the defendant be convicted, the court, in pronouncing sentence, may consider whether his guilt is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it. But the truth of the matter charged in the libel is in no case to be inquired into without such plea of justification. And this defence is not to prejudice any defence admissible under the

plea of not guilty. If the defendant have judgment on the issue on such special plea, he is entitled, in the case of an indictment by a private prosecutor, to his costs; on the other hand, if the issue be found for the prosecutor, he is entitled to recover from the defendant the costs sustained by him by reason of the plea. 6 & 7 *Vict. c.* 96, *s.* 8.

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### *Indictment for Seditious Words.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., being a wicked, malicious, seditious, and ill-disposed person, and wickedly, maliciously, and seditiously contriving and intending the peace of our said lady the Queen and this kingdom of England to disquiet and disturb, and the liege subjects of our said lady the Queen to incite and move to the hatred and dislike of the person of our said lady the Queen; and to scandalize and vilify the colonels and other officers of the guards of our said lady the Queen, on the third day of August in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, in the presence and hearing of divers liege subjects of our said lady the Queen, wickedly, maliciously, and seditiously did publish, utter, pronounce, and declare with a loud voice, of and concerning our said lady the Queen, and of and concerning the colonels and other officers of the guards of our said lady the Queen, these English words following; that is to say: "The colonels and the rest of the officers (meaning the colonels and officers of the guards of our said lady the Queen) are a company of rogues and villains; for their business is to uphold their mistress (meaning our said lady the Queen), who (meaning our said lady the Queen) is a villain and a rogue, and never kept her word in anything she said:" to the great scandal of our said lady the Queen, and of the colonels and other officers of the guards of our said lady the Queen, in contempt of our said lady the Queen, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *If there be any doubt of being able to prove this precise form of words, you may vary the statement in different counts.*

*Fine and imprisonment. As to what amounts to sedition, see ante, p.* 524.

### *Evidence.*

Prove that the defendant spoke the words set out in the indictment, or at least so much of them as may amount to an indictable offence; *see Cro. Jac.* 407: *Maitland* v. *Golney*, *Campagnon* v. *Martin*, 2 *East*, 434; *Per Lawrence*, J., 2 *W. Bl.* 790. Any variance in substance will be fatal: even where the words were set out in the indictment in the third person, "*He is*," *&c.*, and proved to have been spoken in the second person, "*You are*," *&c.*, the variance was holden fatal; *R.* v. *Berry*, 4 *T. R.* 217; and where the words set out imported they were spoken of a thing then present, and the words were proved to have been spoken of a thing not present at the time the variance was holden to be fatal. *Walters* v. *Mace*, 2 *B. & Ald.*

756. Prove the innuendos, as in the last precedent, and see the evidence under the last precedent, generally.

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BLASPHEMOUS LIBELS.

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*Statute.*

9 & 10 *W*. 3, *c*. 32, *s*. 1—*Penalties.*]—Whereas many persons have, of late years, openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of this kingdom; wherefore, for the more effectual suppressing of the said detestable crimes, be it enacted, &c., that if any person or persons, having been educated in, or at any time having made profession of the Christian religion within the realm, shall by writing, printing, teaching, or advised speaking, . . . . . . . . . . assert or maintain there are more gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, and shall, upon an indictment or information in any of his Majesty's courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more credible witnesses, such person or persons, for the first offence, shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil, or military, or any part in them, or any profit or advantage appertaining to them or any of them; and if any person or persons so convicted as aforesaid shall, at the time of his or their conviction, enjoy or possess any office, place, or employment, such office, place, or employment shall be void, and is hereby declared void. And if such person or persons shall be a second time lawfully convicted as aforesaid of all or any of the aforesaid crime or crimes, that then he or they shall from henceforth be disabled to sue, prosecute, plead, or use any action or information, in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever, within this realm, and shall also suffer imprisonment for the space of three years, without bail or mainprize, from the time of such conviction.

Sect. 2—*Limitation of Prosecutions*]—Provides and enacts, that no person shall be prosecuted by virtue of this act, for any words spoken unless the information of such words shall be given upon oath, before one or more justice or justices of the peace, within four days after such words spoken, and the prosecution of such offence be within three months after such information.

Sect. 3—*Relief from Penalties*]—Provides and enacts, that any person or persons convicted of all or any of the aforesaid crime or crimes in manner aforesaid, shall, for the first offence, (upon his,

her, or their acknowledgment, and renunciation of such offence or erroneous opinions, in the same court where such person or persons was or were convicted, as aforesaid, within the space of four months after his, her, or their conviction), be discharged from all penalties and disabilities incurred by such conviction; anything in this act contained to the contrary thereof in anywise notwithstanding.

*Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., bookseller, being a wicked and evil-disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this kingdom, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms at the parish aforesaid, in the county aforesaid, unlawfully and wickedly did compose, print, and publish, and cause and procure to be composed, printed, and published, a certain scandalous, impious, blasphemous, and profane libel, of and concerning the Holy Scriptures, and the Christian religion, in one part of which said libel there were and are contained, amongst other things, certain scandalous, impious, blasphemous, and profane matters and things, of and concerning the Holy Scriptures and the Christian religion, according to the tenor and effect following, that is to say: [*here set out the libellous passage; and, if there be another such passage in another part of the libel, introduce it thus:* and in another part thereof there were and are contained, amongst other things, certain other scandalous, impious, blasphemous, and profane matters and things, of and concerning the said Holy Scriptures and the Christian religion, according to the tenor and effect following, that is to say, *&c. &c. and conclude the count thus*]:—to the high displeasure of Almighty God, to the great scandal and reproach of the Christian religion, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *See the observations upon the form of an indictment for libel, ante, p. 525.*

*Fine and imprisonment. See 9 & 10 W. 3, c. 32, s. 1; and see R.* v. *Carlile, 3 B. & Ald.* 161: *R.* v. *Waddington,* 1 *B. & C.* 26. *Blasphemy and offences against religion are not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

The evidence is the same as that mentioned *ante, p.* 527, under the first precedent in this section. The disputes of learned men upon particular controverted points of religion are not punishable as blasphemy. *Per Cur. in R.* v. *Woolstan,* 2 *Str.* 834. The cases upon this subject are, *R.* v. *Attwood, Cro. Jac.* 421: *R.* v. *Taylor, Vent.* 293: *R.* v. *Clendon, Str.* 789: *R.* v. *Hale, Str.* 416: *R.* v. *Sline, Dig. L. L.* 83: *R.* v. *Annett,* 2 *Burn, E. L.* 781: *R.* v. *Wilkes,* 2 *Stark. Sl.* 141: *R.* v. *Williams, Ib.*: *R.* v. *Eaton, Id.* 142: *R.* v. *Carlile,* 3 *B. & Ald.* 161: *R.* v. *Waddington,* 1 *B. & C.* 26: *R.* v. *Taylor,* 2 *Stark. Sl.* 143. It is immaterial whether the publication be oral or written. 2 *Stark. Sl.* 141. The statutes relating to blasphemy are, 1 *Edw.* 6, *c.* 1; 1 *Eliz. c.* 2; 12 *Eliz. c.* 12; 3 *Jac.* 1, *c.* 21, *s.* 9; 9 & 10 *W.* 3, *c.* 32; 53 *G.* 3, *c.* 160; but these do not alter the common law. 1 *B. & C.* 26.

*Indictment for selling an obscene Print.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., bookseller, being a scandalous and evil-disposed person, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said lady the Queen to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, and the clergy of this kingdom to bring into great contempt, hatred, scandal, infamy, and disgrace, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, in a certain open and public shop of him the said J. S., there situate, unlawfully, wickedly, maliciously, and scandalously did sell and utter to one J. N., a certain lewd, wicked, scandalous, and obscene print or paper, intituled "The Parson receiving Tithes in kind," representing a man in the habit of a clergyman, in an obscene, impudent, and indecent posture with a woman; and which said lewd, wicked, scandalous, and obscene print or paper is contained in a certain printed pamphlet then and there uttered and sold by him the said J. S. to the said J. N., intituled "The Covent Garden Magazine, or Amorous Repository, calculated solely for the Entertainment of the Polite World, for April 1773;" to the manifest corruption of the morals as well of youth as of other liege subjects of our said lady the Queen, to the great scandal, infamy, and disgrace of the clergy of this kingdom, in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine and imprisonment. See R.* v. *Sedley*, 2 *Str.* 791 : *R.* v. *Hill*, *Id.* 790 : *R.* v. *Read*, *Fost. Rep.* 98 : *R.* v. *Curl*, 2 *Str.* 788 : *R.* v. *Wilkes*, 4 *Burr.* 2527, 2574. *See also* 3 *G.* 4, *c.* 40, *s.* 3.

*Evidence.*

Give the print in evidence, and prove that J. N. purchased it of the defendant, or of his servant, at his shop.



SECT 4.

UNLAWFUL OATHS.



*Statute.*

37 *G.* 3, *c.* 123, *s.* 1—*Punishment.*]—Whereas divers wicked and evil-disposed persons have of late attempted to seduce persons serving in his Majesty's forces by sea and land, and others of his Majesty's subjects, from their duty and allegiance to his Majesty, and to incite them to acts of mutiny and sedition, and have endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon

the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered; be it enacted, &c., that any person or persons who shall, in any manner or form whatsoever, administer or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years; and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years.

Sect. 3—*Aiders and Abettors*]—Enacts, that persons aiding and assisting at, or present at and consenting to, the administering or taking of any such oath or engagement as aforesaid, and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and shall be tried as such, although the person or persons who actually administered such an oath or engagement, if any such there shall be, shall not have been tried or convicted.

Sect. 4—*Form of Indictment*]—Enacts, that it shall not be necessary, in any indictment against any person or persons administering or causing to be administered or taken, or taking, any such oath or engagement as aforesaid, or aiding and assisting at, or present at and consenting to, the administering or taking thereof, to set forth the words of such oath or engagement; and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.

Sect. 5—*Form of Oath*]—Enacts, that any engagement or obligation whatsoever, in the nature of an oath, shall be deemed an oath within the intent and meaning of this act, in whatever form or manner the same shall be administered or taken; and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

Sect. 6—*Venue*]—Enacts, that any offence committed against this act on the high seas, or out of this realm, or within that part of Great

Britain called England, shall and may be prosecuted, tried, and determined, before any court of oyer and terminer or gaol delivery, for any county in that part of Great Britain called England, in such manner and form as if such offence had been therein committed; and if committed in that part of Great Britain called Scotland, shall and may be prosecuted, tried, and determined, either before the justiciary court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom.

[By 57 *G.* 3, *c.* 19, *s.* 25, all societies, the members whereof shall be required to take any oath or engagement which shall be unlawful within the 37 *G.* 3, *c.* 123, or the 52 *G* 3, *c.* 104, or to take any oath not required or authorized by law, &c., are to be deemed guilty of an unlawful combination within the stat. 39 *G.* 3, *c.* 79. *See R.* v. *Dixon*, 6 *C.* & *P.* 501.]

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*Indictment for administering an unlawful Oath.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, did feloniously and unlawfully administer and cause to be administered unto one J. N. a certain oath and engagement, purporting, and then and there intended, to bind the said J. N. not to inform or give evidence against any associate, confederate, or other person of and belonging to a certain unlawful association and confederacy; and which said oath and engagement was then and there taken by the said J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the offence have been committed on the high seas, or out of the realm, the venue may be laid in any county in England.* 37 *G.* 3, *c.* 123, *s.* 6.

*Felony, transportation for seven years.* 37 *G.* 3, *c.* 123, *s.* 1.

*The offence of administering or taking unlawful oaths is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante p.* 69).

It is not necessary to set out the words of the oath; stating the purport, or some material part of it, is all that is required. 37 *G.* 3, *c.* 123, *s.* 4. The oath described by the statute must purport or be intended to bind the party taking it to one or other of the following things:—*viz.* 1. To engage in some mutinous or seditious purpose; 2. To disturb the public peace; 3. To be of some association, society, or confederacy formed for any such purpose; 4. To obey the orders or commands of a committee or body of men not lawfully constituted, or of a leader or commander or other person not having authority by law for that purpose; 5. Not to inform or give evidence against any associate, confederate, or other person; 6. Not to reveal or discover any unlawful combination or confederacy; 7. Not to reveal or discover any illegal act done, or to be done; 8. Not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement. 37 *G.* 3, *c.* 123, *s.* 1. If the purport of the oath be doubtful, you should set it out in different ways in several

counts, taking care to bring it within some of the descriptions above mentioned. *See R.* v. *Moors*, 6 *East*, 419, *n.* (*a*).

*Evidence.*

Prove that J. S. administered to J. N. an oath or engagement (it is no matter in what form, 37 *G.* 3, *c.* 123, *s.* 5; *see R.* v. *Loveless*, 1 *M.* & *Rob.* 349; 6 *C.* & *P.* 596) of the purport stated in some one count in the indictment. If read from a paper at the time it was administered, still it is not necessary to produce such paper, or give the defendant notice to produce it; but parol evidence of its purport, without such notice will be sufficient. *R.* v. *Moors*, 6 *East*, 421. So, parol evidence of any declarations made by the defendant at the time he administered the oath, will be received in proof of the nature of the oath, if that do not sufficiently appear from the words of the oath itself. *Id.* And where it appeared that an oath was unlawfully administered by an associated body of men, purporting to bind the party not to reveal such unlawful combination or conspiracy, or any illegal act done by them, the judges seemed to have no doubt of its being a felony within this act, although it appeared that the object of the association was a conspiracy to raise wages and make regulations in a particular trade, and not to stir up mutiny or sedition. *R.* v. *Marks*, 3 *East*, 157: *see R.* v. *Ball*, 6 *C.* & *P.* 563: *R.* v. *Broadribb*, *Id.* 571.

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy, (unless expressly declared by some statute to be legal), for whatever purpose or object it may be formed; and the administering an oath not to reveal anything done in such association is an offence within the statute 37 *G.* 3, *c.* 123, *s.* 1. *R.* v. *Loveless*, 1 *M.* & *Rob.* 349; 6 *C.* & *P.* 596.

*Indictment for taking such an Oath.*

*Commencement as ante, p.* 536]—in the county aforesaid, did feloniously and unlawfully take a certain oath and engagement, purporting [&c. *as in the last precedent*]: he the said J. S. not being then and there compelled to take the said oath and engagement; against the form of the statute in such case made and provided; and against the peace of our lady the Queen, her crown and dignity.

*Felony.* 37 *G.* 3, *c.* 123, *s.* 1. *See the last precedent.*

As to the evidence, *vide supra.* It is not necessary to prove that any person administered the oath. 37 *G.* 3, *c.* 123, *s.* 5. Nor is it necessary for the prosecutor to prove that the defendant was not compelled to take the oath; compulsion is matter of excuse, and must come in evidence from the other side. And in order to make it a legal excuse, the defendant must prove that he disclosed the whole affair upon oath to a magistrate (or, if a soldier or seaman, to his commanding officer) within four days after, unless prevented by actual force or sickness, and then within four days after such force and sickness ceased. *Id. s.* 2.

## OATHS TO COMMIT TREASON OR FELONY.

### *Statute.*

52 *G.* 3, *c.* 104, *s.* 1.]—Whereas an act passed in the thirty-seventh year of the reign of his present Majesty, intituled "An Act for more effectually preventing the administering or taking of Unlawful Oaths;" and whereas it is expedient that more effectual provisions should be made as to certain oaths; be it therefore enacted, that every person who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall on conviction thereof by due course of law, be adjudged guilty of felony, and suffer death as a felon, without benefit of clergy; and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and shall be transported as a felon for the term of his natural life, or for such term of years as the court before which the said offender or offenders shall be tried shall adjudge.

Sect. 7—*Venue*]—Provides and enacts, that any offence committed against this act on the high seas, or out of this realm, or within that part of Great Britain called England, shall and may be prosecuted, tried, and determined before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if such offence had been therein committed; and, if committed in that part of Great Britain called Scotland, shall and may be prosecuted, tried, and determined, either before the justiciary court at Edinburgh, or in any of the circuit courts in that part of the united kingdom.

7 *W.* 4 *&* 1 *Vict. c.* 91, *s.* 1—*Commutation of Punishment*]—*Recites* (*inter alia*) *the* 52 *G.* 3, *c.* 104, *s.* 1, *so far as it relates to administering the oaths therein mentioned*, and enacts, that if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sect. 2—*Place and Mode of Imprisonment.*]—(*Ante, p.* 468).

### *Indictment for administering.*

*Commencement as ante, p.* 536]—a certain oath and engagement,

purporting and then and there intended to bind the said J. N. to commit high treason [*or*, to commit murder, that is to say, feloniously and of his malice aforethought to kill and murder one A. B., *or*, to commit a certain felony punishable by law with death, that is to say, feloniously to set fire to a certain dwelling-house of one A. B., the said A. B. being therein]: and which said oath and engagement was then and there taken by the said J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony*, 52 *G.* 3, *c.* 104, *s.* 1, *transportation for life or not less than fifteen years, or imprisonment for not more than three years*, 7 *W.* 4 & 1 *Vict. c.* 91, *s.* 1, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 2. *Taking such an oath, felony, transportation for life or for such term as the court shall adjudge. Ib. As to the evidence, see the proofs under the precedent, ante, p.* 537. *If the offence be committed on the high seas, or out of the realm, the venue may be laid in any county.* 52 *G.* 3, *c.* 104, *s.* 7.

## Sect. 5.

### INCITING TO MUTINY.

*Statute.*

37 *G.* 3, *c.* 70, *s.* 1.]—Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in his Majesty's forces by sea and land from their duty and allegiance to his Majesty, and to incite them to mutiny and disobedience; be it enacted, that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces by sea or land from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy.

Sect. 2]—Provides and enacts, that any offence committed against this act, whether committed on the high seas or within that part of Great Britain called England, shall and may be prosecuted and tried before any court of oyer and terminer or gaol delivery, for any county in that part of Great Britain called England, in such manner and form as if the said offence had been therein committed.

7 *W.* 4 & 1 *Vict. c.* 91, *s.* 1]—*Recites* (*inter alia*) *the* 37 *G.* 3, *c.* 70, *s.* 1; and enacts, that if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore men-

tioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sect. 2—*Place and Mode of Imprisonment.*]—(*Ante, p.* 468).

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*Indictment for endeavouring to seduce a Soldier from his Allegiance.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, being a wicked and evil-disposed person, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, maliciously, and advisedly, did endeavour to seduce one J. N. (he the said J. N. then and there being a person serving in her Majesty's forces by land) from his duty and allegiance to her said Majesty; he the said J. S., at the time he so endeavoured to seduce the said J. N. from his duty and allegiance as aforesaid, well knowing that the said J. N. was then and there a person serving in her said Majesty's forces by land; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The venue may be laid in any county.* 37 *G.* 3, *c.* 70, *s.* 2.

*Felony, transportation for life, or not less than fifteen years, or imprisonment, for not more than three years,* 7 *W.* 4 *&* 1 *Vict. c.* 91, *s.* 1, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 2, (*ante, p.* 468). *The offence described in the statute is an endeavour to seduce any person serving in his Majesty's forces by sea or land, from his duty or allegiance to his Majesty; or to incite or stir him up to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever. It is not necessary to allege the means by which the defendant endeavoured to seduce him. R.* v. *Fuller,* 1 *B. & P.* 180. *As to inducing soldiers to desert, see* 6 *G.* 4, *c.* 5.

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Although in the indictment it is not necessary to state the means by which the defendant endeavoured to seduce J. N. from his duty and allegiance, they must be detailed in evidence. It must be proved, also, that J. N. was at the time serving in her Majesty's land forces; and that J. S. was aware of that fact. A sailor who has been in the sick hospital for thirty days, and therefore is not entitled to pay, nor liable to answer before a court-martial for what he does, is nevertheless a person serving in her Majesty's navy, within this act. *R.* v. *Tierney, R. & R.* 74.

## Sect. 6.

### EMBEZZLING THE QUEEN'S STORES.

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*Statute.*

4 *G.* 4, *c.* 53—*Embezzling the Queen's Stores.*]—Whereas by an act passed in the twenty-second year of the reign of his late Majesty King Charles the Second, intituled "An Act for taking away the benefit of clergy from such as steal cloth from the rack, and from such as shall steal or embezzle his Majesty's ammunition and stores," the benefit of clergy is taken away from persons convicted of . . . . . . . stealing or embezzling any of his Majesty's sails, cordage, or any other his Majesty's naval stores, to the value of twenty shillings, provided that it shall be lawful for the judges to grant a reprieve for the staying of the execution of such offenders, and to cause them to be transported for the space of seven years, and kept to hard labour . . . . . . And whereas it is expedient that a lesser degree of punishment than that of death should be provided for the offence from which the benefit of clergy is so taken away as aferesaid, and that the same punishment should be extended in manner hereinafter mentioned; be it therefore enacted, &c., that so much of the said recited act, as takes away the benefit of clergy from the persons convicted of the offences hereinbefore mentioned, shall be, and the same is hereby repealed; and that from and after the passing of this act, every person who shall be lawfully convicted of . . . . stealing or embezzling his Majesty's ammunition, sails, cordage, or naval or military stores, . . . . . or of procuring, counselling, aiding, or abetting any such offender, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years.

[*This act is repealed by* 7 *&* 8 *G.* 4, *c.* 27, *s.* 1, "*except so far as relates to any person convicted of stealing or embezzling his Majesty's ammunition or ordnance, naval and military stores, or of being accessary to any such offence.*"]

1 *G.* 1, *s.* 2, *c.* 25, *s.* 4—*Embezzling the Queen's Stores, under the value of* 20*s.*]—And whereas divers ill-disposed persons, upon pretence of carrying his Majesty's naval goods, provisions, victuals, stores, and ammunition from his Majesty's yards, wharfs, storehouses, or other places, to his Majesty's ship or ships, or to such ship or ships as are employed in his Majesty's service, or such persons as are employed to re-carry or remove from the said ship or ships such naval stores, goods, provisions, victuals, stores, and ammunition to such his Majesty's yards, wharfs, storehouses, or other places, do frequently embezzle, take, and carry them away where they cannot be found, and remove themselves to places unknown be-

fore they can be apprehended or convicted by due process of law, by reason that those witnesses that should prove the said facts are bound forth to sea, or otherwise employed elsewhere, and it is found necessary that justice be more speedily done in such cases than by ordinary course of law it can be: be it therefore enacted, that the treasurer, comptroller, surveyor, clerk of the acts, and commissioners of the navy, for the time being, or any one or more of them, where the goods so embezzled, taken, or carried away, shall be under the value of twenty shillings, shall have full power and authority, upon the oath of one or more witnesses, (which they or any of them have hereby power to administer), or confession of such party so offending as aforesaid, or other legal proof thereof, to convict the party or parties so offending, by writing under his or any of their hands and seals, and to impose such fine or fines upon all or every such person or persons so offending and convicted, as aforesaid, as to the said treasurer, comptroller, surveyor, clerk of the acts, and the commissioners of the navy, for the time being, or any one or more of them, shall in his or their discretion seem meet; the said fine or fines not exceeding double the value of the naval goods, provisions, victuals, stores, or ammunition so embezzled or carried away; which fine or fines shall be levied by distress and sale of the goods of such offender, by virtue of the warrant of such officer or officers who shall so convict the said offender, directed in manner aforesaid to the person or persons aforesaid, returning the overplus, if any be, to the owner of such goods; or in case no sufficient distress can be found as aforesaid, the party or parties so offending shall, by virtue of the warrant of such officer before whom such person shall be convicted, be imprisoned in the next gaol for any space of time not exceeding three months, without bail or mainprize.

### *Indictment for embezzling the Queen's Stores.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, having the charge and custody of certain military stores ("*ammunition, sails, cordage, or naval or military stores*") of and belonging to her said Majesty, to wit, two muskets of the value of two pounds, two hundred pounds weight of leaden bullets of the value of twenty shillings, and two hundred pounds weight of gunpowder of the value of ten pounds, then and there unlawfully did embezzle the said military stores so in his charge and custody as aforesaid; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Transportation for life, or for not less than seven years, or imprisonment, with or without hard labour, not exceeding seven years. 4 G. 4, c. 53. The words of the statute are "steal or embezzle." Where the stores are under the value of twenty shillings, see 1 G. 1, st. 2, c. 25.*

*This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1, (ante, p. 69).*

### *Evidence.*

Prove the embezzlement of the articles mentioned in the indictment or some of them. The value is immaterial. Prove that the defendant had the charge or custody of them at the time he embezzled them; if he had not the charge or custody of them, he should be indicted for stealing them.

## HAVING POSSESSION OF NAVAL STORES.

### *Statute.*

9 & 10 *W.* 3, *c.* 41, *s.* 1—*No warlike Stores to be made with the King's Mark.*]—Whereas, notwithstanding divers good laws made and enacted for the preventing of the stealing and embezzlement of his Majesty's stores of war, and naval stores, those frauds, thefts, and embezzlements are frequently practised, and the conviction of such offenders is rendered difficult and impracticable, by reason it rarely happens that direct proof can be made of such offender's immediate taking, embezzling, or carrying away any of his Majesty's said stores of war and naval stores out of or from his Majesty's storehouses, docks, yards, ships, ordnance, or other places for keeping and preserving the same, but only that such goods are marked with the King's mark, and found in the custody and possession of the said person prosecuted for stealing or embezzling the same, to the great encouragement of such wicked offenders, and to his Majesty's and the kingdom's great damage: for preventing such embezzlements for the future, and for the more effectual execution of the laws and statutes already in force against such embezzlements and thefts, be it therefore enacted, &c., that from and after the 24th day of June, 1698, it shall not be lawful to or for any person or persons whatsoever, other than persons authorized by contracting with his Majesty's principal officers or commissioners of the navy, ordnance, or victualling office, for his Majesty's use, to make any stores of war or naval stores whatsoever, with the marks usually used to and marked upon his Majesty's said warlike and naval or ordnance stores; that is to say, any cordage of three inches and upwards, wrought with a white thread laid the contrary way, or any smaller cordage, to wit, from three inches downwards, with a twine in lieu of a white thread, laid the contrary way as aforesaid, or any canvass wrought or unwrought, with a blue streak in the middle, or any other stores with the broad arrow, by stamp, brand, or otherwise, upon pain that every such person or persons who shall make such goods, so marked as aforesaid, not being a contractor with his Majesty's principal officers or commissioners of the navy, ordnance, or victuallers, for his Majesty's use, or employed by such contractor for that purpose, as aforesaid, shall, for every such offence, forfeit such goods, and the sum of two hundred pounds, together with costs of suit, one moiety whereof shall be to his Majesty, and the other moiety to the informer, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, wherein no essoin, privilege, protection, wager of law,

injunction, or order of restraint, nor more than one imparlance, shall be allowed.

Sect. 2—*Punishment for having Naval Stores in Possession*]—Enacts, that such person or persons, in whose custody, possession, or keeping, such goods or stores marked as aforesaid shall be found, not being employed as aforesaid, and such person or persons who shall conceal such goods or stores marked as aforesaid, being indicted and convicted of such concealment, or of the having such goods found in his custody, possession, or keeping, shall forfeit such goods, and the sum of two hundred pounds, together with the costs of prosecution, one moiety to his Majesty, and the other moiety to the informer, to be recovered as aforesaid, and shall also suffer imprisonment until payment and performance of the said forfeiture, unless such person shall, upon his trial, produce a certificate under the hand of three or more of his Majesty's principal officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, quantities, or weights of such goods, as he or she shall then be indicted for, and the occasion and reason of such goods coming to his or her hands or possession.

Sect. 4—*Sale of Stores and Certificate*]—Provides and enacts, &c., that the said principal officers or commissioners of the navy, ordnance, or victualling office, for the time being, may sell and dispose of any of the stores aforesaid, so marked as aforesaid, as they did or might have done before the making of this act; and that such person or persons as heretofore have or shall hereafter buy any such stores, or other stores so marked as aforesaid, of the said principal officers or commanders, or by their order, may keep and enjoy the same without incurring the penalty of this act, or any law to the contrary whatsoever, upon producing a certificate or certificates, under the hand and seal of three or more of the said principal officers or commissioners of the navy, ordnance, or victualling office, that they bought such goods from them the said principal officers or commissioners, or from such person or persons as did buy the said stores from the said principal officers or commissioners, at any time before such stores were found in their custody; in which certificates the quantities of such stores shall be expressed, and the time when and where bought of the said commissioners, who, or any three or more of them for the time being, are hereby empowered and directed, from time to time, to give such person or persons who shall desire the same, and have bought, and shall hereafter buy, any of the aforesaid stores, within thirty days after the sale and delivery of the said stores so sold or to be sold as aforesaid.

39 & 40 *G.* 3, *c.* 89, *s.* 1—*Selling or receiving new Stores of War*]—*Recites stats.* 9 & 10 *W.* 3, *c.* 41; 9 *G.* 1, *c.* 8; *and* 17 *G.* 2, *c.* 40, *s.* 10; *and then proceeds thus:*—And whereas, notwithstanding the penalties and punishments inflicted by the said recited acts, the stealers, embezzlers, and receivers of his Majesty's warlike and naval, ordnance, and victualling stores, have greatly increased, so that it has become necessary to make some further and more effectual provision for preventing their wicked practices in future; be it therefore enacted, &c., that, from and after the passing of

this act, every person or persons, (such person or persons not being a contractor or contractors, or employed as in the said recited act of the ninth and tenth years of the reign of King William the Third is mentioned), who shall willingly or knowingly sell or deliver, or cause or procure to be sold or delivered, to any person or persons whomsoever, or who shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping, any stores of war, or naval, ordnance, or victualling stores, or any goods whatsoever, marked as in the said recited acts are expressed, or any canvass, marked either with a blue streak in the middle, or with a blue streak in a serpentine form, or any bewper, otherwise called bunting, wrought with one or more streaks of raised tape, (the stores of war, or naval, ordnance, or victualling stores, or goods above mentioned, or any of them, being in a raw or unconverted state, or being new, or not more than one third worn), and such person or persons, who shall conceal such stores or goods, or any of them, marked as aforesaid, shall be deemed receivers of stolen goods, knowing them to have been stolen, and shall, on being convicted thereof in due form of law, be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported by the laws and statutes of this realm, unless such person or persons shall, upon his, her, or their trial, produce a certificate, under the hands of three or more of his Majesty's principal officers or commissioners of the navy, ordnance, or victualling, expressing the numbers, quantities, or weights of such stores or goods, as he, she, or they shall then be indicted for, and the occasion and reason of such stores or goods coming to his, her, or their hands or possession.

Sect. 2—*Whipping and Imprisonment*]—Enacts, that such person or persons, [not being a contractor or contractors, or employed as aforesaid], in whose custody, possession, or keeping, any of the said stores, called canvass, marked with a blue streak in a serpentine form, or bewper, otherwise called bunting, wrought as above mentioned, shall be found, (such canvass or bewper, otherwise called bunting, not being charged to be new, or not more than one-third worn), and all and every person and persons, who shall be convicted of any offence contrary to so much of the said recited act of the ninth and tenth years of the reign of King William the Third, as relates to the making, or the having in possession, or concealing any of his Majesty's warlike, or naval, or ordnance stores, marked as therein specified, shall, besides forfeiting such stores, and the sum of two hundred pounds, together with costs of suit as therein mentioned, be corporally punished, by (*pillory*) whipping, and imprisonment, or by any or either of the said ways and means, in such manner, and for such space of time, as to the judge or justices, before whom such offender or offenders shall be convicted, shall seem meet; anything in the said last-mentioned act, or in the before-recited acts of the ninth year of King George the First, and the seventeenth year of King George the Second, to the contrary thereof in anywise notwithstanding; provided always, that it shall and may be lawful to and for such judge or justices to mitigate the said penalty of two hundred pounds, as he or they shall see cause.

Sect. 3—*Contractors*]—Provides and enacts, that nothing in this act, or in the said recited act of the ninth and tenth years of the reign of King William the Third, contained, shall extend, or be deemed, taken, or construed to exempt from the operation of this act or of the said recited act, respectively, any person or persons, being a contractor or contractors, or employed as in the said last-mentioned act is mentioned, except only so far as concerns stores or goods marked as aforesaid, which shall be *bonâ fide* provided, made up, or manufactured by such person or persons, or by their order, and which shall not have been before delivered into his Majesty's stores, unless, having been so delivered, they shall have been sold or returned to such person or persons, by the commissioners of his Majesty's navy, ordnance, or victualling, respectively.

Sect. 4—*Defacing Government Marks*]—Enacts, that if any person or persons shall, from and after the passing of this act, wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate, or erase, wholly or in part, any of the marks in the said act of the ninth and tenth years of the reign of King William the Third or in this act mentioned, or any other mark whatsoever, denoting the property of his Majesty, his heirs or successors, in or to any warlike or naval, ordnance, or victualling stores, or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing his Majesty's property in such stores, such person or persons shall be deemed guilty of felony, and shall, on being convicted thereof, be transported to parts beyond the seas for the term of fourteen years, in like manner as other felons are directed to be transported by the laws and statutes of this realm.

Sect. 5—*Punishment for Second Offence*]—Enacts, that if any person or persons who shall hereafter be convicted of any offence contrary to this act, for which he shall not have been transported beyond the seas, or contrary to the said recited act of the ninth and tenth years of King William the Third, shall be guilty of a second offence, either contrary to that act or to this present act, which would not otherwise, as the first offence, subject him, her, or them to transportation, and shall be thereof legally convicted, such person or persons shall, by judgment of the court wherein he, she, or they shall be so convicted, be transported to parts beyond the seas for the term of fourteen years, in like manner as other offenders may be transported by the laws and statutes of this realm now in force.

Sect. 7—*Mitigation of Punishment*]—Provides and enacts, that it shall and may be lawful to and for the court before whom any offender or offenders shall be indicted and convicted of all or any of the crimes or offences hereinbefore mentioned to be punishable with transportation, to mitigate or commute such punishment, by causing the offender or offenders to be (*set on the pillory*) publicly whipped, fined, or imprisoned, or by all or any one or more of the said ways and means as such court in its discretion shall think fit; one moiety of which fine (if any imposed) shall be to his Majesty, his heirs and successors, and the other moiety thereof to the informer, and also to order such offender or offenders to be imprisoned until such fine be

paid; anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

Sect. 25—*Sale by Commissioners*]—Enacts, that the said commissioners of the navy, ordnance, or victualling, for the time being, may sell and dispose of any of the stores aforesaid, so marked as aforesaid, as they did or might have done before the making of this act; and that such person or persons as heretofore have, or shall hereafter buy any such stores or other stores so marked as aforesaid of the said respective commissioners, may keep and enjoy the same without incurring the penalty of this act, or any law to the contrary whatsoever, upon producing a certificate or certificates, under the hand and seal of three or more of the said commissioners, that they bought such goods or stores from them at any time before they sold or delivered the same, or before the same were found in their custody, or a certificate from such person or persons as shall appear to have bought the said stores from them the said commissioners, that the stores so sold or delivered by them, or so found in their custody, were the stores or part of the stores so bought of the said commissioners as aforesaid: in which certificate or certificates the quantities of such stores shall be expressed, and the time when and where bought of the said commissioners, who, or any three or more of them for the time being, and also the person or persons afterwards selling the same, are hereby empowered and directed from time to time to give such certificate to such person or persons as shall desire the same, and have bought and shall hereafter buy any of the aforesaid stores within thirty days after the sale and delivery thereof.

Sect. 36—*False Certificates*]—Enacts, that if any person or persons shall make, sign, or give any false certificate, bill of parcels, or other instrument purporting the identity or the sale or disposal of any goods or stores as goods or stores so purchased of the said commissioners as aforesaid, or if any person or persons shall utter or publish any such false certificate, bill of parcels or other instrument purporting as aforesaid, knowing the same to be false, every such offender upon conviction thereof in due form of law, shall forfeit the sum of two hundred pounds, and be further corporally punished, as by this act is directed with respect to persons having in their possession or concealing his Majesty's warlike, naval, or ordnance stores, contrary to the said act of the ninth and tenth years of King William the Third, one moiety of which penalty shall be to his Majesty, his heirs and successors, and the other moiety thereof, with full costs of suit, to the informer, to be recovered in such manner as the penalty of two hundred pounds, inflicted by the said last-mentioned act, is by that act or any law now in force made recoverable.

*Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, (not being then and there, or at any time before, a contractor with, or authorized, by contracting

with her Majesty's principal officers or commissioners of the navy, ordnance, or victualling office, for her said Majesty's use, to make any stores of war, or naval stores whatsoever, with the marks usually used to and marked upon her Majesty's said warlike and naval or ordnance stores, and not being employed by any such contractor or contractors for that purpose as aforesaid), at the parish aforesaid, in the county aforesaid, then and there unlawfully had in the custody and possession of him the said J. S. [a certain quantity of cordage, containing in length seventy yards, and in thickness three inches and upwards, of the value of twenty pounds; which said cordage then and there was wrought with a white thread laid the contrary way, (being the mark with which cordage of that thickness, being warlike and naval stores of our lady the Queen, then and before that time usually were and yet are marked)]; the said cordage then and there being new; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add a second count, charging that, on &c., at &c.,* "a certain other quantity of cordage," *&c., as above,* "was found in the custody and possession of the said J. S., he the said J. S. not being then and there, or at any time before, a contractor," *&c. as above;* "against the form," *&c. Add a third count, the same as the first, but substituting the words,* "did conceal," *for the words* "had in the custody and possession of him the said J. S."

*Two hundred pounds fine, together with the costs of the prosecution, one moiety to the Queen, and the other to the informer, (that is, the person by means of whose information the stores were seized,* 1 *Esp.* 95, 116), *and imprisonment until the fine, &c., be paid;* 9 *&* 10 *W.* 3, *c.* 41, *s.* 2; *and also whipping or imprisonment, or both, at the discretion of the judge before whom the defendant shall be convicted.* 39 *&* 40 *G.* 3, *c.* 89, *s.* 2. *The judge, however, may mitigate the above penalty. Id. For a second offence, the prisoner shall be transported for fourteen years. Id. s.* 5, *but the judge may mitigate the penalty. Id. s.* 7. *This offence is not punishable with hard labour. R.* v. *Bridges,* 8 *East,* 53: *Silversides* v. *Reg.,* 3 *Q. B.* 406; 2 *G. & D.* 617.

There are several kinds of stores described in the above statutes, 9 *&* 10 *W.* 3, *c.* 41, *ss.* 1, 2; 39 *&* 40 *G.* 3, *c.* 89, *s.* 2, and also in 9 *G.* 1, *c.* 8, *s.* 3; 54 *G.* 3, *c.* 60; and 55 *G.* 3, *c.* 127: and care must be taken to bring the stores mentioned in the indictment within some one of these descriptions.

By stat. 39 *&* 40 *G.* 3, *c.* 89, *s.* 1, if the stores found be "in a raw or unconverted state, or be new or not more than one third worn," the defendant shall be deemed a receiver of stolen goods, and may be transported for fourteen years; or (by *s.* 7) the judge may sentence him to be whipped, fined, and imprisoned; a moiety of which fine (if imposed) shall go to the Queen, and the other moiety to the informer. An indictment on this statute may be the same as the form above mentioned, excepting that, immediately after the description of the stores, you add "which said —— were then and there in a raw and unconverted state," or "were then and there new," or "were then and there not more than one third worn."

An indictment under the 39 *&* 40 *G.* 3, *c.* 89, which alleged that the defendant, on the 10th day of May, 1842, not being a contractor [without the words "then and there"] had in his possession naval

stores, was held sufficient, the date being applied to both the allegations following. *Silversides* v. *Reg.*, 3 *Q. B.* 406; 2 *G. & D.* 617.

### *Evidence for the Prosecution.*

All that is necessary on the part of the prosecution, is, to prove that stores, such as those described in the indictment, were found in the defendant's possession. It is not necessary to give evidence to prove the negative averment, that the defendant is not a contractor, &c.; if he be, that is matter of defence, and he must prove it.

If there be any dispute as to who is to be deemed the informer, the judge or justices, before whom the defendant shall be convicted, shall examine and finally determine the matter. 9 *G.* 1, *c.* 8, *s.* 5.

### *Evidence for the Defendant.*

If the defendant be a contractor, or a person employed by a contractor for the purpose of manufacturing, &c., the stores mentioned in the indictment, he must prove this, and it will be a good excuse for his having them in his possession. *See* 9 & 10 *W.* 3, *c.* 41, *s.* 1; 39 & 40 *G.* 3, *c.* 89, *s.* 3. So, he may justify his possession of them by producing the regular certificate for the goods, under the hands of three or more of the principal officers or commissioners of the navy, ordnance, or victualling office, stating the numbers, quantities, and weights of such goods, and the reason of their coming into the defendant's hands. 9 & 10 *W.* 3, *c.* 41, *ss.* 2, 4, 8; 39 & 40 *G.* 3, *c.* 89, *ss.* 25, 26. So, where a woman was indicted for having naval stores, namely, canvass, in her possession, and she proved that it was in common use in her family during her husband's lifetime, and came to her upon his death, and was constantly used by her as table linen afterwards; this was holden to be a sufficient excuse; and the defendant was acquitted. *Fost.* 432; 2 *East, P. C.* 765. So, if the defendant prove that he bought the stores in question from s person who was in the habit of purchasing at the navy sales, and who he was therefore led to presume had the regular certificate, it will be a sufficient excuse. *R.* v. *Banks*, 1 *Esp.* 145.

## CHAPTER II.

### OFFENCES AGAINST PUBLIC JUSTICE.



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### Sect. 1.

#### ESCAPE.

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*Statute.*

4 *G.* 4, *c.* 64, *s.* 44—*Venue and Evidence*]—To the intent that prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as is possible, be it enacted, that any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken; and in case of any prosecution for any such escape, attempt to escape, breach of prison, or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced.

*Indictment against a Constable for a negligent Escape.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of B.,

in the county of M., J. S., then being one of the constables of the said parish, brought one J. N. before A. C., esquire, then and yet being one of the justices of our said lady the Queen, assigned to keep the peace for our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said J. N. then and there was charged before the said A. C. by one Catherine Hope, spinster, upon the oath of the said Catherine, that he the said J. N, had then lately before violently, and against her will, feloniously ravished and carnally known her the said Catherine; and the said J. N. was then and there examined before the said A. C., the justice aforesaid, touching the said offence so to him charged as aforesaid; upon which the said A. C., the justice aforesaid, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date the said third day of August, in the year aforesaid, directed to the keeper of Newgate or his deputy, commanding him the said keeper or his deputy, that he should receive into his custody the said J. N., brought before him and charged upon the oath of the said Catherine Hope, with the premises above specified; and the said justice, by the said warrant, did command the said keeper of Newgate, or his deputy, to safely keep him the said J. N. there until he by due course of law should be discharged; which said warrant afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, was delivered to the said J. S., then being one of the constables of the said parish as aforesaid, and then and there having the said J. N. in his custody for the cause aforesaid; and the said J. S. was then and there commanded by the said A. C., the justice aforesaid, to convey the said J. N., without delay, to the said gaol of Newgate, and to deliver him the said J. N. to the keeper of the said gaol, or his deputy, together with the warrant aforesaid.* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, baker, afterwards, to wit, on the day and year last aforesaid, then being one of the constables of the said parish as aforesaid, and then having the said J. N. in his custody for the cause aforesaid, at the parish aforesaid, in the county aforesaid, the said J. N. out of the custody of him the said J. S. unlawfully and negligently did permit to escape, and go at large whithersoever he would, whereby the said J. N. did then and there escape, and go at large whithersoever he would; to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine.* 2 *Hawk. c.* 19, *s.* 31. *Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both. Id. c.* 20, *s.* 6. *The imprisonment must be for some criminal matter, otherwise the escape is not punishable criminally.*

## *Evidence.*

Prove that J. N. was charged with a rape, as alleged in the indictment. Prove the warrant of commitment in substance as set out in the indictment, either by producing the warrant itself, or, after proving the service of a notice upon the defendant to produce it, by parol

or other secondary evidence of its contents. Prove a delivery of the warrant to the defendant. Prove that he had J. N. in actual custody under the warrant. *See* 2 *Hawk. c.* 19, *ss.* 1, 4. And lastly, prove the escape. It is not necessary to prove negligence in the defendant; the law implies it; *see* 1 *Hale*, 600; but if the escape were not in fact negligent, if the defendant by force rescued himself, or were rescued by others, and the defendant made fresh suit after him, but without effect; all this must be shewn upon the part of the defendant. Also, it is immaterial whether J. N. were guilty of the rape or not, provided the warrant were such as would justify J. S. in detaining him. (*See ante, p.* 423).

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### *Indictment for escaping out of the Custody of a Constable.*

*State the charge before the magistrate, the warrant of commitment, and the defendant's being in the custody of J. S., as in the last precedent, to the*; and then proceed thus*] and the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., late of the parish aforesaid, in the county aforesaid, labourer, so being in the custody of the said J. S., under and by virtue of the warrant aforesaid, afterwards and whilst he continued in such custody, and before he was delivered by the said J. S. to the said keeper of Newgate, or his deputy, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, out of the custody of the said J. S. unlawfully did escape, and go at large whithersoever he would, to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *The venue may be laid in the county where the offence was committed, or in that which the defendant was apprehended and retaken*, 4 *G.* 4, *c.* 64, *s.* 44, (*ante, p.* 550).

*Fine and imprisonment. See* 2 *Hawk. c.* 17, *s.* 5. *See the evidence under the last precedent.*

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### *Indictment against a Gaoler for a Voluntary Escape.*

Berkshire, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, [at the general quarter sessions of the peace holden at ——, *so continuing the record of the conviction of the party who escaped, stating it, however, in the past and not in the present tense;* (*see ante, p.* 89); *then proceed thus*]: as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the said general quarter sessions of the peace above mentioned, he the said J. N. was then and there committed to the care and custody of J. S., he the said J. S. then and still being keeper of the common gaol in and for the said county of Berks, there to be kept and imprisoned in the gaol aforesaid, according to and in pursuance of the judgment and sentence aforesaid; and the said J. S. him the said J. N. then and there had in the custody of him the said J. S., for the cause aforesaid, in the gaol aforesaid. And the jurors first

aforesaid, upon their oath aforesaid, do further present, that the said J. S. late of the parish of L., in the said county of Berks, yeoman, afterwards, and before the expiration of the six calendar months for which the said J. N. was so ordered to be imprisoned as aforesaid, and whilst the said J. N. was so in the custody of the said J. S. as such keeper of the said common gaol as aforesaid, to wit, on the third day of August, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously, [*if the offence for which J. N. was convicted were a felony*], unlawfully, voluntarily, and contemptuously, did permit and suffer the said J. N. to escape, and go at large whithersoever he would; whereby the said J. N. did then and there escape out of the said prison, and go at large whithersoever he would; in contempt of our said lady the Queen and her laws, contrary to the duty of the said J. S., so being keeper of the gaol aforesaid, in manifest hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*A voluntary escape amounts to the same offence, and is punishable in the same degree, as the offence of which the prisoner was guilty, and for which he was in custody, whether treason, felony, or trespass. The officer, however, cannot be thus punished until after the original delinquent has been convicted; but before such conviction, he may be fined and imprisoned as for a misdemeanor.* 4 *Bl. Com.* 130; 1 *Hale*, 234; 2 *Hawk. c.* 19, *s.* 22.

### *Evidence.*

Prove the conviction of J. N., and that, upon his conviction, he was remanded or committed to the custody of the defendant, as keeper of the common gaol of the county of Berks. This may be proved by the certificate of the clerk of assize or other clerk of the court in which the offender shall have been convicted, which, together with proof of identity, is sufficient evidence of the nature and facts of the conviction, and of the species and period of the confinement. 4 *G.* 4, *c.* 64, *s.* 44, (*ante, p.* 550). The certificate must set forth the effect and substance of the conviction. *R.* v. *Watson*, *R. & R.* 468. Prove him afterwards to have been in the custody of the defendant, in pursuance of his sentence. And, lastly, prove the escape. It does not seem to be necessary to prove that the escape was voluntary; the law, it should seem, will presume that, until the contrary appear.

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## Sect. 2.

### BREACH OF PRISON.

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### *Statutes.*

1 *Ed.* 2, *st.* 2, *c.* 1.]—Concerning prisoners which break prison, our lord the King willeth and commandeth, that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken

and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise.

7 & 8 *G.* 4, *c.* 28, *s.* 8—*Offences not punishable by particular Statutes*]—Enacts, that every person convicted of any felony, not punishable with death, shall be punished in the same manner prescribed by the statute or statutes specially relating to such felony; and that every person convicted of any felony, for which no punishment hath been, or hereafter may be, specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

Sect. 9—*Place and Mode of Imprisonment*]—With regard to the place and mode of imprisonment for all offences punishable under this act, enacts, that where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet. *See* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169).

*Indictment for breaking Prison.*

*Proceed as in the precedent ante, p.* 550, *to the words* "until he by due course of law should be discharged," *in the description of the warrant of commitment, and then proceed thus:*] by virtue of which said warrant, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, the said J. N. was taken and conveyed to the said gaol of Newgate, and then and there delivered to one W. S., the keeper of the said gaol, and the said W. S., keeper of the said gaol, then and there received him the said J. N., in his custody in the gaol of Newgate, aforesaid.* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., late of the parish of B., in the county of M., labourer, afterwards, and whilst he so remained in custody of the said W. S., keeper of the said gaol, under and by virtue of the warrant aforesaid, to wit, on the third day of September in the year last aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, [*if he was committed for treason or felony*], unlawfully, wilfully, and injuriously did break the gaol of Newgate aforesaid, by then and there cutting and sawing two iron bars of the said gaol, and also by then and there breaking, cutting, and removing a great quantity of stone, parcel of the wall of the gaol aforesaid; by means whereof he the said J. N. did then and there escape, and go at large whithersoever he would; to the great hindrance and obstruction of justice, in contempt of our lady the Queen and her laws, to the evil

example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *The venue may be laid in the county where the offence was committed, or in that in which the defendant was apprehended and retaken.* 4 *G.* 4, *c.* 64, *s.* 44, (*ante, p.* 550).

*Felony, if the defendant were in custody for treason or felony,* 1 *Ed.* 2, *st.* 2 ; 1 *Hale,* 612, *transportation for seven years, or imprisonment not exceeding two years, with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 28, *s.* 9, *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169) ; *and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit ;* 7 *&* 8 *G.* 4, *c.* 28, *s.* 8 : *fine and imprisonment, if he were in custody for any other offence.* 2 *Hawk. c.* 18, *s.* 21.

### *Evidence.*

Prove the charge before the magistrate, and the warrant, as directed *ante, p.* 551. Prove that the defendant was afterwards lodged in the gaol mentioned in the indictment, in the custody of the keeper ; and prove that, while in custody there under the warrant, he broke the gaol and escaped.

The escape must be proved, if the breaking be charged as a felony ; 2 *Hawk. c.* 18, *s.* 12 ; but otherwise, it should seem, if it be a misdemeanor only. And the breaking proved must be an actual breaking : merely getting over the walls, or passing out through a door, or the like, is an escape only, and not a breach of prison ; 1 *Hale,* 611 ; *and see R.* v. *Burridge,* 3 *P. Wms.* 439 ; and on this account, it should seem that the manner of the breaking should be stated in the indictment, as in the above precedent, in order that the court may see that it was such as is necessary in law to constitute a breach of prison. But the breaking need not be intentional ; and therefore where a prisoner, in effecting his escape, by accident threw down some loose bricks at the top of the prison wall, placed there to impede escape and give alarm, it was holden to be a prison breach. *R.* v. *Haswell, R. & R.* 458.

Every place where a man's person is lawfully imprisoned, whether upon accusation or after conviction, such as the common gaol, the constable's house, the stocks, &c., is a prison within the meaning of the statute ; 2 *Hawk. c.* 18, *s.* 4 ; and as described in the indictment, so it must be proved.

Although it is not material, in this case, whether the defendant were guilty of the offence for which he was imprisoned or not, 2 *Hawk. c.* 18, *s.* 16, yet if he can prove that no such offence was ever actually committed, or that he was arrested and detained without any reasonable cause of suspicion against him, 1 *Hale,* 610, 611, or if he have been subsequently indicted for the offence and acquitted, this will be a sufficient defence to the indictment for breach of prison.



## AIDING PRISONERS TO ESCAPE.

### *Statutes.*

4 *G.* 4, *c.* 64, *s.* 43—*Punishment*]—Enacts, that if any person shall convey or cause to be conveyed into any prison to which this act shall extend, any mask, vizor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such vizor or disguise, instrument or arms, with intent to aid and assist such prisoner to escape or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for any terms not exceeding fourteen years.

16 *G.* 2, *c.* 31, *s.* 1—*Aiding Escapes*]—For the further punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody, enacts, &c., that if any person shall, from and after the 24th day of June, 1743, by any means whatsoever, be aiding or assisting to any prisoner to attempt to make his or her escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to or detained in any gaol for treason, or any felony except petty larceny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years; and in case such prisoner then was convicted of, committed to, or detained in any gaol for petty larceny, or any other crime, not being treason or felony, expressed in the warrant of his or her commitment or detainer, as aforesaid, or then was in gaol upon any process whatsoever for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every person so offending as aforesaid, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be liable to a fine and imprisonment.

Sect. 2—*Conveying into Prison the Means of Escape*]—Enacts, that if any person shall, from and after the said 24th day of June, 1743, convey or cause to be conveyed into any gaol or prison, any vizor or other disguise, or any instrument or arms proper to facilitate the escape of the prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such gaol, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper or under-keeper of any such gaol or prison, every such person, although no escape or attempt to escape be ac-

tually made, shall be deemed to have delivered such vizor, or other disguise, instrument, or arms, with an intent to aid and assist such prisoner to escape or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to or detained in any such gaol for treason, or any felony except petty larceny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall in like manner be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America for the term of seven years; but in case the prisoner to whom, or for whose use, such vizor or disguise, instrument or arms, shall be so delivered, then was convicted, committed, or detained for petty larceny, or any other crime, not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every such person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be in like manner liable to a fine and imprisonment.

Sect. 3—*Aiding Escape from Constable*]—Enacts, that if any person shall, from and after the 24th day of June, 1743, aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person, who shall then have the lawful charge of such prisoner, in order to carry him or her to gaol, by virtue of a warrant of commitment for treason or any felony (except petty larceny) expressed in such warrant; or if any person shall be aiding or assisting to any felon to attempt to make his escape from on board any boat, ship, or vessel, carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns, or agents, or any other person, to whom such felon shall have been lawfully delivered in order for transportation; then every person so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years.

Sect. 4—*Limitation*]—Provides and enacts, that there shall be no prosecution for any of the said offences, unless such prosecution be commenced within one year after such offence committed.

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*Indictment for conveying Files to a Prisoner, to enable him to escape.*

Berkshire, to wit:—The jurors for our lady the Queen upon their oath present, that, before and at the time of the committing of the felony hereinafter mentioned, to wit, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of R., in the county of B., one J. N. was a prisoner, and in custody of one W. S., in the common gaol in and for the county of Berks; and that J. S., late of the parish aforesaid, in the county aforesaid, labourer, afterwards, and whilst the said J. N. was such prisoner and in custody as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, feloni-

ously did convey and cause to be conveyed into the gaol aforesaid, two steel files, being instruments proper to facilitate the escape of prisoners, and the same files, being such instruments as aforesaid, then and there feloniously did deliver and cause to be delivered to the said J. N., ("*any prisoner or other person for the use of any prisoner*"), the said J. N. then and there being such prisoner in custody of W. S. as aforesaid, without the consent or privity of the said keeper of the said gaol; which said files, being such instruments as aforesaid, were then and there so conveyed into the said gaol, and delivered to the said J. N. by the said J. S. as aforesaid, with the felonious intent to aid and assist the said J. N., so being such prisoner and in custody as aforesaid, to escape, and attempt to escape, from and out of the said gaol; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation not exceeding fourteen years.* 4 *G.* 4, *c.* 69, *s.* 43. *See* 7 *&* 8 *G.* 4, *c.* 28, *s.* 10, (*ante, p.* 169). *This statute applies to all prisons, except Bethlehem, Bridewell, the King's Bench and Fleet Prisons, the prison of the Marshalsea and Palace Court, and the Penitentiaries at Millbank and Gloucester. With respect to these, the offence is felony, transportation for seven years, if the prisoner were at the time convicted of treason or felony, or committed for treason or felony expressed in the warrant; misdemeanor, fine, and imprisonment, if convicted or committed for any other offence, or for a debt, damages, or costs in a civil case amounting to* 100*l.* 16 *G.* 2, *c.* 31, *s.* 2. *Aiding and assisting a prisoner to attempt an escape from those gaols, although no escape be actually made, is punishable in the same manner. Id. s.* 1. *By* 4 *G.* 4, *c.* 64, *s.* 1, *the* 16 *G.* 2 *is repealed so far as relates to the escape of any prisoner from any gaol or prison to which that act shall extend; and see ss.* 2 *and* 76, *and* 5 *G.* 4, *c.* 85, *ss.* 9 *and* 27. *It is a misdemeanor indictable at common law, to aid a person to escape from custody, who is confined under the remand of the Insolvent Debtors' Court. Reg.* v. *Allan, C. & Mar.* 295. *And aiding and assisting a prisoner, in custody for treason or felony, to make his escape from the constable or officer conveying him, under a warrant, to prison, is felony, transportation for seven years.* 16 *G.* 2, *c.* 31, *s.* 3. *An indictment upon the latter statute must set forth the warrant, &c., as in the last precedent, to the asterisk *, and then proceed to allege the conveying of the files as above. And if the prisoner were convicted at the time the files were conveyed to him, it must be stated accordingly, (as ante, p.* 552). *As to the Penitentiary at Millbank, see* 56 *G.* 3, *c.* 53, *s.* 44; 59 *G.* 3, *c.* 136, *s.* 17; *and* 7 *W.* 4 *&* 1 *Vict.* c. 91, *s.* 1; 6 *&* 7 *Vict. c.* 26. *As to the Pentonville prison, see* 5 *&* 6 *Vict. c.* 29, *ss.* 24, 25. *Aiding and assisting prisoners of war to escape is felony, transportation for life, or fourteen or seven years.* 52 *G.* 3, *c.* 156; *see R.* v. *Martin, R. & R.* 196. *As to aiding and assisting persons convicted by a military or naval court-martial to escape, see* 6 *G.* 4, *c.* 5, *s.* 13; 6 *G.* 4, *c.* 6, *s.* 14.

## *Evidence.*

To support this indictment, prove that J. N. was in custody, and a prisoner in the gaol mentioned in the indictment. The words of the statute are, "any prisoner." Prove that whilst J. N. was so in custody, the defendant conveyed to him one or more files; and

prove that such files were calculated to facilitate his escape, by filing his irons, or the window bars, or the like. The mere delivery of such instruments shews the intent, and it is immaterial, upon this statute, whether an escape be actually made or not. 4 *G.* 4, *c.* 64, *s.* 43. No time is limited for the prosecution of offences against this statute.

To support an indictment upon the stat. 16 *G.* 2, *c.* 31, prove the charge before the magistrate, the warrant, and that J. N. was in custody in gaol, under the warrant. Where the commitment was *on suspicion* of felony, it was holden not to be within that act, which extends only to cases where the offence is clearly and plainly expressed in the warrant, or where the prisoner stands convicted of it. *R.* v. *Walker*, 1 *Leach*, 97 : *and see Id.* 98, *n.*, 363. If a prisoner be convicted, it is an offence within this statute to deliver instruments to him to facilitate his escape, though he be pardoned of the offence of which he was convicted, on condition of transportation, and even though the party delivering the instruments did not know of what specific offence the prisoner was convicted. *R.* v. *Shaw*, *R.* & *R.* 526. Prove the delivery of the files, as above, and, lastly, prove the offence to have been committed within one year next before the commencement of the prosecution. 16 *G.* 2, *c.* 31, *s.* 4. This statute does not extend to cases where an *actual escape* is made. *R.* v. *Tilley*, 2 *Leach*, 662.

## Sect. 3.

### RESCUE.

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#### *Statutes.*

1 & 2 *G.* 4, *c.* 88, *s.* 1.]—Whereas divers daring attempts have of late been made to effect the rescue or prevent the detention of persons charged with or committed for or on suspicion of felony; and whereas it might tend more effectually to prevent the commission of such offences, if such further provisions were made for the punishment of persons who may hereafter be convicted thereof, as are hereinafter enacted : Be it therefore enacted, that from and after the passing of this act, if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years.

25 *G.* 2, *c.* 37, *s.* 9—*Rescuing Murderers while proceeding to Execution.*]—Be it enacted by the authority aforesaid, that if any person or persons whatsoever shall by force set at liberty or rescue, or attempt to rescue or set at liberty, any person out of prison, who shall be committed for or found guilty of murder, or rescue, or attempt to rescue, any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony, and shall suffer death, without benefit of clergy.

7 *W.* 4 & 1 *Vict. c.* 91, *s.* 1—*Punishment for rescuing Murderers*]—*Recites* 25 *G.* 2, *c.* 37, *s.* 9, and enacts, that if any person shall, after the commencement of this act, (1 Oct. 1837), be convicted of the offence thereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sect. 2—*Place and Mode of Imprisonment.*]—(*Ante, p.* 468).

*Indictment for the Rescue of a Felon from a Constable.*

*State the charge before the magistrate, the warrant, the delivery of it to the constable, and J. N.'s being in his custody under it, as in the precedent ante, p.* 550, *to the words* "together with the warrant aforesaid" *inclusive. Then proceed thus*]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., late of the parish of B., in the county of M., labourer, and J. T. late of the same place, labourer, afterwards, and whilst the said J. N. was in the custody of the said J. S., under the said warrant as aforesaid, and whilst the said J. S. was conveying the said J. N. under and by virtue of the said warrant, to the said gaol of Newgate, to wit, on the day and year last aforesaid, with force and arms, at the parish last aforesaid, in the county aforesaid, in and upon the said J. S., (then and there being a constable as aforesaid, and then and there lawfully having the said J. N. in his custody, by virtue of the said warrant, for the cause aforesaid), in the due execution of his said office then and there being, did make an assault, and him the said J. S. then and there did beat, wound, and ill-treat; and that the said J. T., the said J. N. out of the custody of the said J. S., and against the will of him the said J. S., then and there unlawfully and forcibly did rescue and put at large, to go whithersoever he would; and that the said J. N., himself out of the custody of the said J. S., and against the will of him the said J. S., then and there unlawfully and forcibly did rescue and put at large, to go whithersoever he would; to the great hindrance of justice, in contempt of our said lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine and imprisonment, as for a misdemeanor, if the party rescued be not convicted of the offence for which he was in custody;* 2 *Hawk.*

*c.* 21, *s.* 8; *but if convicted, then, if for high treason, the rescue is high treason; if for felony, felony; if for a misdemeanor, a misdemeanor.* 1 *Hale*, 607. *If the rescuers be convicted of felony, the court, at its discretion, may adjudge them to be transported for seven years; or to be imprisoned, or imprisoned and kept to hard labour, for not less than one year nor more than three years.* 1 *&* 2 *G.* 4, *c.* 88, *s.* 1. *See* 7 *&* 8 *G.* 4, *c.* 28, *s.* 10, (*ante, p.* 169). *Rescuing, or attempting to rescue, a person convicted of murder, whilst proceeding to execution, or rescuing out of prison a person committed or convicted for murder, is felony,* 25 *G.* 2, *c.* 37, *s.* 9, *transportation for life, or for not less than fifteen years, or imprisonment not exceeding three years,* 7 *W.* 4 *&* 1 *Vict. c.* 91, *s.* 1, *with or without hard labour, and with or without solitary confinement, not exceeding one month at any one time, or three months in any one year. Id. s.* 2, (*ante, p.* 468). *Rescuing offenders under sentence of transportation from the custody of the superintendent, &c. conveying them, is punishable in the same manner as if the party had been confined in gaol.* 5 *G.* 4, *c.* 84, *s.* 22, *infrà.*

*See a precedent of an indictment for rescuing a distress for rent, Cro. Cir. Com.* 409; *and for rescuing cattle, (taking damage feasant) out of a pound. Id.* 410. *R.* v. *Bradshaw*, 7 *C. & P.* 233.

### *Evidence.*

Prove the charge before the magistrate, the warrant, and that J. N. was in the custody of J. S. under the warrant. If the party were convicted, the conviction may be proved by a certificate of the proper officer. 4 *G.* 4, *c.* 64, *s.* 44, (*ante, p.* 550), *and* 5 *G.* 4, *c.* 84, *s.* 24, *infrà.* And prove that whilst so in custody the defendant forcibly rescued him, as stated in the indictment. A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such party, is good; and, therefore, if upon such warrant the party be arrested and afterwards rescued, those who are guilty of the rescue may be convicted of a misdemeanor. *R.* v. *Stokes*, 5 *C. & P.* 148.

As to evidence for the defendant, it may be observed, that any circumstances that will excuse a breach of prison will excuse a rescue. (*See ante, p.* 555). 2 *Hawk. c.* 21, *ss.* 1, 2.

## SECT. 4.

### RETURNING FROM TRANSPORTATION.

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### *Statutes.*

5 *G.* 4, *c.* 84, *s.* 22—*Punishment—Venue*]—Enacts, that if any offender who shall have been or shall be sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions,

either for life or any number of years, under the provisions of this or any former act, shall be afterwards at large within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, shall suffer death as in cases of felony, without the benefit of clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue or attempt to rescue, or assist in rescuing or attempting to rescue any such offender from the custody of such superintendent or overseer, or of any sheriff or gaoler, or other person conveying, removing, transporting, or reconveying him or her, or shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted.

Sect. 23—*Indictment*]—Enacts, that in any indictment against any offender for being found at large contrary to the provisions of this or of any other act now made or hereafter to be made, and also in any indictment against any person who shall rescue or attempt to rescue, or assist in rescuing any such offender from such custody, or who shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or of any other act now made or hereafter to be made, whether such offender shall have been tried before any court or judge within or without the United Kingdom, or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy, or signification thereof, of or against, or in any manner relating to such offender.

Sect. 24—*Evidence of Conviction*]—Enacts, that the clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment, (not taking for the same more than six shillings and eightpence), which certificate shall be sufficient evidence of the conviction, or sentence or order for the transportation or banishment of such offender: and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence,

upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge, or one of the judges of the court, without further proof.

4 & 5 *W*. 4, *c*. 67]—*Recites* 5 *G*. 4, *c*. 84, *s*. 22, and enacts, that so much of the recited act as inflicts the punishment of death upon persons convicted of any offence therein and hereinbefore specified, shall be and the same is hereby repealed; and that from and after the passing of this act, any person convicted of any offence above specified in the said act of the fifth year of the reign of his late Majesty King George the Fourth, or of aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life, and previously to transportation shall be imprisoned, with or without hard labour, in any common gaol, house of correction, prison, or penitentiary, for any term not exceeding four years.

*Indictment for returning from Transportation.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, [at the general quarter sessions of the peace, holden at——, *so continuing the caption of the indictment to the words* "county committed," (*see ante*, *p*. 90); *then proceed thus*]: it was ordered that J. S. should be transported for the term of seven years, to such place beyond the seas as our said lady the Queen, by and with the advice of her privy council, should appoint, which said order still remains in full force and effect, and not in the least reversed or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, that is to say, after he, the said J. S., was so ordered to be transported as aforesaid, and before the expiration of the term of seven years for which he the said J. S. was so ordered to be transported as aforesaid, to wit, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, feloniously and unlawfully, and without any lawful cause or excuse whatsoever, was at large within the United Kingdom of Great Britain and Ireland, to wit, at the parish of B., in the county of M., aforesaid; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*It is sufficient in the indictment to charge and allege the order made for the transportation or sentence of the offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon, or intention of mercy, or signification thereof, of, or against, or in any manner relating to such offender.* 5 *G*. 4, *c*. 84, *s*. 23. *See R.* v. *Fitzpatrick*, *R*. & *R*. 512. *The venue may be laid either in the county where the defendant was apprehended, or in the county whence he was ordered to be transported.* 5 *G*. 4, *c*. 84, *s*. 22.

*Felony.* 5 *G*. 4, *c*. 84, *s*. 22. *Transportation for life, with previous imprisonment, with or without hard labour, for any term not exceeding four years.* 4 & 5 *W*. 4, *c*. 67. *This offence is not triable at any*

*quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69). *There are several other statutes in particular cases. See* 59 *G.* 3, *c.* 113, *s.* 17 ; 56 *G.* 3, *c.* 64, *s.* 44 ; 56 *G.* 3, *c.* 63, *s.* 45, *as to the Penitentiary ;* 6 *G.* 4, *c.* 85, *s.* 18, *and* 4 & 5 *Vict. c.* 56, *s.* 1, *as to offenders transported from St. Helena ; also the Mutiny Act, and the act relating to the marine forces* (*annual*).

*Evidence.*

Prove the order of transportation by a certificate in writing, which the clerk of the court, or other officer having the custody of the records of the court where such order was made, must give upon application, and which is made evidence upon proof of the signature and official character of the person signing the same ; or if it be a court out of Great Britain, if verified by the seal of the court, or by the signature of the judge or one of the judges of the court, without further proof. 5 *G.* 4, *c.* 84, *s.* 24. The certificate must contain the effect and substance of the indictment and conviction of such offender, and of the sentence or order for transportation ; merely stating that the prisoner was convicted of felony, without stating the nature of the felony, is insufficient. *R.* v. *Watson, R.* & *R.* 468. You must also prove the prisoner's identity.

Prove, also, that the defendant was at large before the expiration of the seven years for which he was ordered to be transported ; and it is for the defendant to shew that he was justified in being at large, as, for instance, that he was pardoned or the like.

The judge, at the trial has power to order the county treasurer to pay the prosecutor the reward under the 5 *G.* 4, *c.* 84, *s.* 22. *Reg.* v. *Emmons,* 2 *M.* & *Rob.* 279.

## Sect. 5.

## PERJURY.

3 *G.* 4, *c.* 114.]—(*Post, p.* 590).

2 *G.* 2, *c.* 25, *s.* 2—*Punishment.*]—The more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, enacts, that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper ; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be

adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person, so committed or transported, shall voluntarily escape or break prison, or return from transportation, before the expiration of the time for which he shall be ordered to be transported, as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.

7 *W.* 4 & 1 *Vict. c.* 23—*Pillory abolished.*]—Enacts, that judgment shall not be given or awarded against any person or persons convicted of any offence, that such person or persons do stand in or upon the pillory, any law, statute, or usage to the contrary notwithstanding: provided that nothing herein contained shall extend or be construed to extend in any manner to change, alter, or affect any punishment whatsoever which may now by law be inflicted in respect of any offence, except only the punishment of pillory.

23 *G.* 2, *c.* 11, *s.* 1—*Form of Indictment for Perjury.*]—Whereas, by reason of difficulties attending prosecutions for perjury and subornation of perjury, those heinous crimes have gone unpunished, whereby wicked and evil-disposed persons are daily more and more emboldened to commit the same, to the great dishonour of God, and manifest let and hindrance of justice; for remedy whereof be it enacted, &c. That in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom, the oath was taken, (averring such court or person or persons to have a competent authority to administer the same), together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid; and without setting forth the commission or authority of the court, or person or persons, before whom the perjury was committed; any law, usage, or custom to the contrary notwithstanding.

Sect. 2—*Form of Indictment for Subornation of Perjury*]—Enacts, that in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or person or persons, before whom the perjury was committed, or was agreed or promised to be committed; any law, usage, or custom to the contrary notwithstanding.

Sect. 5.—*Prosecutions by Direction of Judge*]—And the better to prevent great offenders from escaping punishment by reason of the

expense attending such prosecutions, enacts, that it shall and may be lawful to and for any of his Majesty's justices of assize, or *nisi prius*, or general gaol delivery, or of any of the great sessions of the principality of Wales, or of the counties palatine, and they are hereby authorized, (sitting the court, or within twenty-four hours after), to direct any person examined as a witness upon any trial before him or them, to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall and are hereby required to do their duty, without any fee, gratuity, or reward for the same; and every such prosecution, so directed as aforesaid, shall be carried on without payment of any tax or duty, and without payment of any fees in court, or to any officer of the court who might otherwise claim or demand the same; and the clerk of assize, or his associate or prothonotary, or other proper officer of the court, (who shall be attending when such prosecution is directed), shall and is hereby required without any fee or reward, to give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, together with the names of the counsel assigned him by the court; which certificate shall in all cases be deemed sufficient proof of such prosecution having been directed as aforesaid; provided that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

*Indictment for Perjury in an Affidavit to hold to Bail.*

London, to wit:—The jurors of our lady the Queen upon their oath present, that J. S., late of London, grocer, wickedly and maliciously contriving and intending unjustly to aggrieve one J. N., and to put him the said J. N. to great expense, and also unjustly and maliciously to cause him the said J. N. to be arrested for the sum of fifty pounds, by virtue of a certain writ of our lady the Queen, called a capias, to be sued out and prosecuted at the suit of him the said J. S., on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at London aforesaid, at the parish of Saint Dunstan in the West, in the ward of Farringdon Without, came in his proper person before Sir J. P., knight, then being one of the justices of the court of our lady the Queen before the Queen herself, and then and there produced a certain affidavit in writing of him the said J. S., and then and there before the said Sir J. P., knight, in due form of law was sworn, and took his corporal oath upon the Holy Gospel of God concerning the truth of the matters contained in the said affidavit, (he the said Sir J. P., knight, then and there having a lawful and competent power and authority to administer the said oath to the said J. S. in that behalf); and that the said J. S., being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there, upon his oath aforesaid, before the said Sir J. P., knight, (the said Sir J. P., knight, then and there having a lawful and competent power and authority to administer the said oath to the said J. S. in that behalf), falsely, corruptly, knowingly, wilfully, and maliciously,

in and by his said affidavit in writing, did depose and swear (amongst other things) in substance and to the effect following, that is to say, that J. N. (meaning the said J. N. above mentioned) was then justly and truly indebted unto him the said J. S. in the sum of fifty pounds, for goods sold and delivered by the said J. S. to the said J. N., and at his (meaning the said J. N.'s) request; as in and by the said affidavit of the said J. S. affiled in the said court of our said lady the Queen before the Queen herself, more fully and at large appears: Whereas in truth and in fact, the said J. N., at the time the said J. S. took his said oath and made his affidavit aforesaid, was not indebted to him the said J. S. in the sum of fifty pounds for goods sold and delivered by the said J. S. to the said J. N.; and whereas, in truth and in fact, the said J. N. was not then indebted to the said J. S. in the sum of fifty pounds on any account whatsoever; and whereas, in truth and in fact, the said J. N. was not then indebted to the said J. S. in any sum whatsoever, on any account whatsoever: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the third day of August in the year last aforesaid, at London aforesaid, in the parish and ward aforesaid, before the said Sir J. P., knight, (he the said Sir J. P., knight, then and there having such power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury; to the great displeasure of Almighty God, in contempt of our lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *See the precedents*, 4 *Went.* 230, 249, 271; *Cro. Cir. Com.* 339, 340, 356. *It is not necessary to set out the jurat of the affidavit; R.* v. *Embden*, 9 *East*, 437; *nor is it necessary to state or prove that the affidavit was affiled in or exhibited to the court, or in any manner used by the defendant or others. R.* v. *Crossley*, 7 *T. R.* 315. *But the indictment must shew a proceeding pending, in order to give jurisdiction to the person administering the oath. Reg.* v. *Pearson*, 8 *C. & P.* 119. *See R.* v. *Koops*, 6 *A. & Ell.* 198: *Reg.* v. *Gardiner*, 2 *Mood. C. C.* 95; 8 *C. & P.* 737. *Where the perjury was charged to have been committed in an affidavit sworn on an interpleader rule, and the indictment set forth the circumstances of the previous trial, the verdict, judgment, and execution, the notice by the defendant to the sheriff not to sell the goods, and his affidavit that they were his property, but omitted to state that a rule had been obtained under the Interpleader Act, it was held bad, as not shewing that the affidavit was made in a judicial proceeding. Reg.* v. *Bishop*, *C. Mar.* 302. *And where the indictment stated that certain persons were commissioners acting in the execution of certain acts of parliament relating to the duties of assessed taxes; and that at a meeting held by them for the purpose of hearing and determining appeals against the certificate of supplementary charges made by J. L., crown surveyor, in pursuance of the said acts, a certain appeal of one W. H. came on in due form of law to be heard; and that the defendant appeared before the said commissioners as a witness for W. H. on the hearing of the said appeal, and took his corporal oath, &c.; it was held bad, as not sufficiently shewing that the oath was taken in a judicial proceeding. Overton* v. *Reg.*, 4 *Q. B.* 83; 3 *G. & D.* 133. *See also Reg.* v. *Bartlett*, 1 *Dowl. & L.* 95. *The indictment must allege that the defendant swore wilfully and corruptly. R.* v. *Stevens*, 5 *B. & C.* 246. *Where a true bill for perjury was found, and the judge at the assises*

*having refused to try it on account of manifest imperfections in the record. a new bill was preferred, whereupon the defendant was found guilty; but a new trial was granted; and then the prosecutor, instead of taking down the old record again, preferred a new indictment, (for the same offence), and removed it into the Court of King's Bench by certiorari, the court refused to stay proceedings upon that indictment until the prosecutor paid the costs of the former proceedings.* R. v. *Tremearne*, 5 *B. & C.* 761; 7 *Dowl. & Ry.* 684.

*It is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil action, until that action is determined, unless the civil action be postponed by the court, that the indictment may be tried first.* R. v. *Ashburn*, 8 *C. & P.* 50.

*Perjury is punishable at common law with fine and imprisonment (to hard labour,* 3 *G.* 4, *c.* 114, *at the discretion of the court; and by stat.* 2 *G.* 2, *c.* 25, *s.* 2, *the judge may order the party to be transported, or to be imprisoned and kept to hard labour in the house of correction, for any term not exceeding seven years. The false affirmation of a Quaker, Moravian, and Separatist, or of a person who shall have been a Quaker, or a Moravian, is punishable in the same manner.* 22 *G.* 2, *c.* 46, *s.* 36; 9 *G.* 4, *c.* 32, *s.* 1; 3 & 4 *W.* 4, *c.* 49; 3 & 4 *W.* 4, *c.* 82; 1 & 2 *Vict. c.* 77. *See* 5 & 6 *W.* 4, *c.* 62, *as to false declarations in lieu of oaths;* 8 & 9 *Vict. c.* 48, *as to declarations in lieu of oaths, before commissioners in bankruptcy; and* 1 & 2 *Vict. c.* 105, *as to the form of administering oaths*: (*ante, p.* 155).

*The offences of perjury and subornation of perjury, &c., are not triable at any quarter sessions. See* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69). *Nor, as it seems, have justices of the peace cognizance of the offence of perjury at common law, so as to apprehend or commit a person charged with it. See Reg.* v. *Bartlett*, 1 *Dowl. & L.* 95; 2 *Hawk. c.* 8, *s.* 64; 1 *Brod. & B.* 548; 3 *G. & D.* 210.

An oath or affirmation, to amount to perjury, must be taken in a judicial proceeding, before a competent jurisdiction: it must also be material to the question depending, and false. *R.* v. *Aylett*, 1 *T. R.* 69.

1. It must be taken in a judicial proceeding.—As if the defendant swear falsely, when examined as a witness at a trial; or in an answer to a bill in equity; 5 *Mod.* 348; 3 *Inst.* 166; or in depositions in a court of equity; 5 *Mod.* 348; or in an affidavit in the courts of Queen's Bench, Common Pleas, Chancery, &c.; 5 *Mod.* 348; 1 *Show.* 335, 397; 1 *Ro. Rep.* 79, *per Coke*, C. J.; or upon a commission for the examination of witnesses; *Cro. Car.* 99; *see* 1 *Bos. & P.* 240; or in justifying bail in any of the courts; or upon an examination before a magistrate; or in a judicial proceeding in a court baron, 5 *Mod.* 348; 1 *Mod.* 55, *per Twisden*, J., or ecclesiastical court, 5 *Mod.* 348, or any other court, whether of record or not. *See* 1 *Hawk. c.* 69, *s.* 3. It was doubted whether perjury could be assigned upon the oath made for the purpose of obtaining a marriage license; *R.* v. *Alexander*, 1 *Leach*, 63; *but see* 1 *Vent.* 370; and in *R.* v. *Foster*, *R. & R.* 459, a false oath taken before a surrogate, to procure a marriage license was holden not sufficient to support a prosecution for perjury. In such a case it has been usual to indict as for a mere misdemeanor at common law. If, in such case, the indictment only charges the taking the false oath, without stating that it was for the purpose of procuring a license, or that a license was thereby procured, the party cannot be punished thereon as for a misdemeanor; but if the purpose is to obtain a license, and the license is obtained,

and the marriage had, the party may be indicted as for a misdemeanor. *R.* v. *Foster*, *R.* & *R.* 459. But see now stats. 3 *G.* 4, *c.* 75, *s.* 10, and 6 & 7 *Will.* 4, *c.* 35, *s.* 38, which subject a false oath or declaration made for this purpose to the penalties of perjury. Perjury may be assigned upon the oath against simony, taken by clergymen at the time of their institution. *R.* v. *Lewis*, 1 *Str.* 70.

2. It must be taken before a competent jurisdiction.—For, if it appear to have been taken before a person who had no lawful authority to administer it, 3 *Inst.* 165, 166, or who had no jurisdiction of the cause, 3 *Inst.* 166; *Yelv.* 111, the defendant must be acquitted. *See R.* v. *Crossley*, 7 *T. R.* 315; 1 *Hawk. c.* 69, *ss.* 3, 4; *Bac. Abr. Perjury*, (A): *R.* v. *Dunn*, 1 *D.* & *R.* 10: *R.* v. *Hanks*, 5 *C.* & *P.* 419. But it is not necessary in the indictment to shew the *nature* of the authority of the party administering the oath. *R.* v. *Callanan*, 6 *B.* & *C.* 102. An indictment for perjury upon the hearing of an information for penalties under the Beer Act 1 *W.* 4, *c.* 64, *s.* 15, did not allege that the magistrates were acting for the division in which the house was situated, and upon that ground was held to be bad. *Reg.* v. *Rawlins*, 8 *C.* & *P.* 439. Commissioners of bankruptcy acting under a fiat grounded on an insufficient petitioning creditor's debt, have authority to take examinations in order to the adjudication that the party is a bankrupt, but not afterwards; and therefore a person swearing falsely before them, after the adjudication, is not guilty of perjury. *Reg.* v. *Ewington*, 2 *Mood. C. C.* 223; *C.* & *Mar.* 319. *See the* 5 & 6 *Vict. c.* 122, *s.* 81. A person is indictable who gives false evidence before a grand jury on a bill of indictment, and the false swearing may be proved by the evidence of other witnesses, examined before them on the same bill. *Reg.* v. *Hughes*, 1 *C.* & *K.* 519.

3. That part of the oath upon which the perjury is assigned, must be material to the matter then under the consideration of the court, 3 *Inst.* 167: *R.* v. *Nichol*, 1 *B.* & *Ald.* 21.—As for instance, if a witness be asked whether goods were paid for on a particular day, and he answer in the affirmative—if the goods were really paid for, though not on that particular day, it will not be perjury, 2 *Ro. Rep.* 41, 42, unless the day be material. So, if a man swear that J. S. beat another with his sword, and it turn out that he beat him with a stick, this is not perjury; for all that was material was the battery. *Hetley*, 97. *See* 1 *Hawk. c.* 69, *s.* 8. But perjury may be assigned upon a man's testimony as to the credit of a witness. 2 *Salk.* 514. So, every question in cross-examination which goes to the witness's credit is material for this purpose. *Reg.* v. *Overton*, 2 *Mood. C. C* 263; *C.* & *Mar.* 655. Or he may be perjured in his answer to a bill in equity, though it be in a matter not charged by the bill. 5 *Mod.* 348; *semb.* 1 *Sid.* 274, 106. *See R.* v. *Dunston*, *Ry.* & *M.*, *N. P. C.* 109; *Reg.* v. *Yates*, *C.* & *Mar.* 132.

4. It must be either false in fact; or, if true, the defendant must not have known it to be so. 1 *Hawk. c.* 69, *s.* 6: 3 *Inst.* 166: *Palmer*, 294.—As, for instance, if a man swear that J. N. revoked his will in his presence—if he really had revoked it, but it were unknown to the witness that he had done so, it is perjury. *Hetley*, 97. And a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false. *Per* Lord *Mans-*

*field*, in *R.* v. *Pedley*, 1 *Leach*, 327. *See* 1 *Hawk. c.* 69, *s.* 7: 3 *Inst.* 166: 1 *Sid.* 419, *cont.*

5. The false oath must be taken deliberately and intentionally, for, if done from inadvertence or mistake, it cannot amount to voluntary and corrupt perjury. 1 *Hawk. c.* 69, *s.* 2. Therefore, where perjury is assigned on an answer in equity, or an affidavit, &c., the part on which the perjury is assigned may be explained by another part, or even by a subsequent answer, &c. 1 *Sid.* 419: *Com. Dig., Just. of Peace,* (B.), 102.

Now, all these things must appear upon the face of the indictment, and be proved as laid. In the introductory part of the indictment, circumstances are stated which shew that the oath was taken in a judicial proceeding, before a competent jurisdiction, and was material to the matter then before the court; the oath is then set out; and the perjury is then assigned upon it, that is, some one or more of the affirmative assertions in it are negatived, or the negative assertions contradicted by the opposite affirmative.

If it appear sufficiently from the oath itself, that it was material to the matter then before the court, it is unnecessary to aver that fact: (*see* 2 *Stark. N. P. C.* 423, *n.*): but if it do not appear, then the materiality of that part of the oath upon which perjury is assigned must be averred; *R.* v. *M'Heron*, 5 *T. R.* 316, *cit. R.* v. *Nichol*, 1 *B. & Ald.* 21; as, for instance, if the perjury were committed upon the trial of a cause, it should be averred that it then and there became a material question whether J. N. was at B. on such a day, and then it may be stated that J. S. swore at that trial that J. N. was not at B. on that day; and lastly, proceed to assign the perjury. This mode of pleading will at once shew the materiality of the evidence; and it is deemed sufficient, without setting out so much of the proceedings of the former trial as might otherwise be necessary to shew that it was material. *R.* v. *Dowlin*, 5 *T. R.* 318.

An averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to by the said J. S. on his oath," is not a good averment of materiality. *Reg.* v. *Goodfellow*, *C. & Mar.* 569. Where the indictment stated, that A. B. stood charged before a justice with having committed a trespass by entering in the day time on certain land in pursuit of game, on the 12th of August, 1843, that the justice proceeded to the hearing of the charge, and that upon the hearing of the charge the defendant swore falsely that he did not see A. B. during the whole of the said 12th day of August; and that, *at the time he the defendant swore as aforesaid*, it was material and necessary for the justice to inquire of and be informed by the defendant, whether he did see the said A. B. at all during the said 12th day of August: this averment was held insufficient, because, consistently with it, it might have been material for the justice to have put this question, and received the answer to it, in some other matter, and not in the matter then in issue before him. *Reg.* v. *Bartholomew*, 1 *C. & K.* 366.

The oath is next set out, together with such innuendos as may be necessary to render the matter of it intelligible, and to connect it clearly with the assignments of perjury contained in the subsequent part of the indictment. As to the use and necessity of an innuendo generally, *see ante, p.* 525; *and see* 1 *T. R.* 70; *Reg.* v. *Virrier*, 4 *P. & D.* 161.

And lastly, as to the assignments of perjury.—They must be by special averment, negativing the oath, or some part or parts of it; merely saying that the defendant falsely swore so and so, would be bad, and even perhaps error. *See R.* v. *Perrott*, 2 *M.* & *Sel.* 379, (*ante, p.* 293). Where a man swore to a fact before a committee of the House of Commons, and afterwards swore directly the contrary before a committee of the House of Lords; an information setting out the substance of his evidence upon both occasions, and concluding "and so,&c., the said —— did commit wilful and corrupt perjury,"—was holden bad; because it did not appear from it which oath was false, which true. *R.* v. *Harris*, 1 *D.* & *R.* 578; 5 *B.* & *Ald.* 926: *see Reg.* v. *Wheatland*, 8 *C.* & *P.* 238.

As to the certainty with which the offence must be set out in the indictment.—Formerly such a degree of nicety was required that it was difficult to obtain a conviction. But now, by stat. 23 *G.* 2, *c.* 11, *s.* 1, (*ante, p.* 576), it is sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom, the oath was taken, (averring such court or person to have a competent authority to administer the same), together with the proper averment or averments to falsify the matter whereon the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, other than as aforesaid, and without setting out the commission or authority of the court or person before whom the perjury was committed. If, however, the prosecutor undertake to set out more of the proceedings than he need under this statute, he must do it correctly, and a variance will be fatal. 5 *T. R.* 317. (*See ante, p.* 102). Where perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment as if continuous, although they are in fact separated by the introduction of other matter. *R.* v. *Callanan*, 9 *Dowl.* & *Ry.* 97; 6 *B.* & *C.* 102. *See R.* v. *Soloman, Ry.* & *M. N. P.* 252: *Reg.* v. *Virrier*, 4 *P.* & *D.* 161.

*Evidence.*

1. In this particular indictment there happens to be nothing in the introductory part of it that requires proof; but in other cases, it may be laid down as a general rule, that every part of the introductory part of the indictment, which cannot be rejected as surplusage, must be proved in substance as laid.

2. The matter sworn must be proved. If in writing, it must be produced. To support the present indictment, get the filacer or other officer in whose custody the affidavit is, to produce it at the trial; and prove, either directly or circumstantially, that it was sworn to by the defendant; as, for instance, that the name subscribed to it is of the defendant's handwriting, and that it was at his suit J. S. was holden to bail, or the like. Where perjury is assigned upon an answer to a bill in equity, it is sufficient, after producing the bill or a copy of it, (*see R.* v. *Laycock*, 4 *C.* & *P.* 326), to produce the answer, and prove either that the defendant was sworn to it, or that the signature to it is of the defendant's handwriting, and that the name subscribed to the jurat is the name and handwriting of a master, or other person having authority for that purpose. *R.* v. *Morris*, 2 *Bur.* 1189: *R.* v. *Benson*, 2 *Camp.* 508. And the same as

to depositions in equity, (*see ante, p.* 128), and other similar cases, so at least as to throw upon the defendant the onus of proving that he was personated. 2 *Bur.* 1189. On the trial of an indictment for perjury alleged to have been committed before justices on the hearing of a case punishable by summary conviction, the conviction is not evidence, for it is irrelevant to the issue. *Reg.* v. *Goodfellow, C & Mar.* 569. It is necessary to prove in substance the whole of what is set out in the indictment as having been sworn by the defendant; proving a part only, it seems, is not sufficient. *R.* v. *Jones, Peake,* 37. Also, it must be proved literally or substantially as set out; *R.* v. *Leafe,* 2 *Camp.* 134; any variance in substance between the indictment and evidence in this respect will be fatal; *see R.* v. *Taylor,* 1 *Camp.* 404; *and see* 2 *Camp.* 509; 1 *Stark. N. P. C.* 518; 1 *T. R.* 237, 240, *n.*; 14 *East,* 218, *n.*; 7 *C. & P.* 559; but the record may be amended at the trial. (*See ante, p.* 102). So, if it be stated that the defendant was sworn on the Gospels, and it be proved that he was sworn in a different manner, according to the custom of his country, the variance will be fatal. *R.* v. *M'Arthur, Peake,* 155. But if it be not proved that he was sworn in any other manner, proof that he was sworn generally, and was examined, will support this allegation. An allegation that he "exhibited a certain information upon oath," does not sufficiently shew that he was sworn. *Reg.* v. *Goodfellow, suprà: R.* v. *Rowley, Ry. & M. N. P.* 302. To prove that the person who administered the oath had authority to do so, it is merely necessary to prove that he performed the duties of a certain office, without showing his appointment, *R.* v. *Verelst,* 3 *Camp.* 432, and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office has authority to administer an oath in such a case. If the indictment allege the perjury to have been committed on the hearing of a charge for a particular offence, it is not sufficient to prove a charge for a different offence in law, although the defendant's evidence given on that occasion would have been material to the charge alleged in the indictment. *Reg.* v. *Goodfellow, C. & Mar.* 569.

3. Some one or more of the assignments of perjury must be proved by two witnesses; (*see ante, p.* 156); and the assignment so proved must be upon a part of the matter sworn which was material to the matter before the court at the time the oath was taken. Where the indictment was for perjury alleged to have been committed on the trial of A. for perjury, who was convicted, it was held to be no defence that the judgment against A. was afterwards reversed on error. *Reg.* v. *Meek,* 9 *C. & P.* 513. Upon an indictment for perjury in giving evidence before the quarter sessions, the prosecutor produced the examination of the defendant before a magistrate, in which he deposed in the direct negative to everything he had sworn before the court; but *Gurney,* B., held this not sufficient *per se,* without other evidence to show that the statement before the court was true, and that before the magistrate false. *Reg.* v. *Wheatland,* 8 *C. & P.* 238. Also, it must not only be proved that the matter sworn, or part of it, is false, but it must appear, either directly or from circumstances, that the defendant knew it to be so, and that he swore to it deliberately. (*See ante, p.* 570).

*Indictment for Perjury upon a Trial at the Assizes.*

Surrey, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the assizes holden for the county of Surrey, on the thirtieth day of March, in the eighth year of the reign of our sovereign lady Victoria, at Kingston upon Thames, in the said county, before Sir J. L., knight, one of the justices of our said lady the Queen assigned to hold pleas in the court of our lady the Queen before the Queen herself, and Sir J. B. B., knight, one of the justices of our said lady the Queen of the bench at Westminster, justices of our said lady the Queen assigned to take the assizes in and for the said county of Surrey, a certain issue between one J. L. and one J. W., in a certain plea of trespass and assault, wherein the said J. L. was plaintiff, and the said J. W. defendant, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which said trial J. S., late of the parish of B., in the county of S., labourer, then and there appeared as a witness for and on behalf of the said J. W., the defendant in the plea aforesaid, and was then and there duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Sir J. L., knight, and the said Sir J. B. B., knight, so being such justices as aforesaid, that the evidence which he the said J. S. should give to the court there, and to the said jury so sworn as aforesaid, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth, (they the said Sir J. L., knight, and Sir J. B. B., knight, justices as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said J. S., in that behalf). And the jurors first aforesaid, upon their oath aforesaid, do further present, that, at and upon the trial of the said issue so joined between the said parties as aforesaid, it then and there became and was a material question whether the said J. W. assaulted and beat the said J. L. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said J. S., being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to pervert the due course of law and justice, and unjustly to aggrieve the said J. L., the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then and there, on the trial of the said issue, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously, before the said jurors so sworn as aforesaid, and before the said Sir J. L., knight, and Sir J. B. B., knight, justices as aforesaid, did depose and swear (amongst other things) in substance and to the effect following, that is to say, that [*here set out the evidence, namely, the examination or cross-examination (upon whichever you mean to assign the perjury, see R.* v. *Dowlin, Peake,* 170) *of J. S., together with the necessary innuendos*]. Whereas, in truth and in fact [*&c. &c, proceeding to assign the perjury as in the precedent, ante, p.* 567]. And so the jurors aforesaid, upon their oath aforesaid, do say, *&c. &c. as in the precedent, ante, p.* 567. *See the precedents,* 4 *Went.* 266, 273; *Cro. Circ. Com.* 351, 353. *And see, where the perjury was committed on the trial of an indictment or information,* 4 *Went.* 239, 275; 6

*Went.* 396; *Cro. Circ. Com.* 359, 362, 364; *R.* v. *Stevens*, 5 *B. & C.* 246. *Where perjury is committed by a witness before any justice of assize, Nisi Prius, or gaol delivery, the judge is empowered to order the party to be prosecuted, and to assign counsel for that purpose, and such prosecution shall be carried on without payment of fees, &c.* 23 *G.* 2, *c.* 11, *s.* 3, (*ante, p.* 565). *The court by which the oath was administered must be correctly described. Where an indictment stated the oath to have been taken before justices assigned to take the assizes, before A. B., one of the said justices, &c., and it appeareth that the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery, it was holden a fatal variance. R.* v. *Lincoln, R. & R.* 421. *But where it stated that the cause was tried at the assizes before E. W., one of the judges, &c., it was holden to be proved in substance by the Nisi Prius Record, which stated, in the usual form, that the cause was tried before the two justices of assize, one of whom was E. W. R.* v. *Alford*, 14 *East*, 218, *n.*

*Evidence.*

Produce an office copy of the record of the trial at which the perjury is alleged to have taken place; or at least produce the *nisi prius* record (*see ante, p.* 126) in order to prove that such a trial took place. Then prove the evidence the defendant gave upon it, by the testimony of some person who was present at the trial. It is sufficient for this purpose if the witness state from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence given by the defendant, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. *R.* v. *Rowley*, 1 *Mood. C. C.* 111: *R.* v. *Munton*, 3 *C. & P.* 498. And lastly, prove the assignments of perjury by two witnesses, as directed *ante, p.* 572.

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*Indictment for Perjury upon a Complaint before a Magistrate.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., surgeon, wickedly and maliciously contriving and intending unjustly to aggrieve one J. N., and him the said J. N. to subject to the punishments, pains, and penalties by the laws of this realm provided for persons guilty of felony and larceny, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, came in his proper person before A. C., esquire, then and yet being one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, and then and there before the said A. C., esquire, in due form of law was sworn, and took his corporal oath upon the Holy Gospel of God (he the said A. C. then and there having a lawful and competent power and authority to administer the said oath to the said J. S. in that behalf); and that the said J. S. being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there, upon his oath aforesaid, before the said A. C., esquire, (the said A. C. then and there having a lawful and compe-

tent power and authority to administer the said oath to the said J. S. in that behalf as aforesaid), upon a certain information, intituled, Middlesex, to wit:—The information of Mr. J. S., [*&c. setting out the title of the information*], falsely, corruptly, knowingly, wilfully, and maliciously, did say, depose, swear, and give information in writing (amongst other things), in substance and to the effect following, that is to say—This informant (meaning the said J. S. S.) upon his oath saith, [*so proceeding to set out the defendant's information upon oath before A. C. with the necessary innuendos; and then proceed to assign the perjury*]: Whereas in truth and in fact, *&c., as ante, p.* 567; *then proceed:* And the jurors aforesaid, upon their oath aforesaid, do further present, that upon the hearing of the said information before the said A. C. as aforesaid, it became and was a material question whether, &c.: And so the jurors aforesaid, upon their oath aforesaid, do say, *&c., as ante, p.* 567. *See the precedents,* 4 *Went.* 232, 244; *Cro. Circ. Com.* 332. *And see, as to the indictment and evidence, ante, p.* 568 *et seq., and Reg.* v. *Gardiner,* 2 *Mood. C. C.* 95; 8 *C. & P.* 737.

(*See the following precedents:—of an indictment for perjury upon the hearing of an appeal at the Quarter Sessions, Cro. Circ. Com.* 334; *in affidavits upon several occasions, Id.* 336, 365; 4 *Went.* 243, 246, 253, 258, 260, 263, 264, 277, 278, 281, 287; *in an affidavit by a petitioning creditor, C. C. C.* 345; *in justifying bail,* 6 *Went.* 423, 424; *upon executing a writ of inquiry, C. C. C.* 361; *in an answer to bill in equity, C. C. C.* 342, 357; *in depositions in equity,* 4 *Went.* 292; *in depositions in the ecclesiastical court,* 4 *Went.* 235, 297; *before arbitrators,* 4 *Went.* 256; *before an election committee of the House of Commons,* 4 *Went.* 300).

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### *Indictment for Subornation of Perjury.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, in Trinity term, in the eighth year of the reign of our sovereign lady Victoria, a certain issue was joined in the court of our lady the Queen, before the Queen herself, (the said court then and still being holden at Westminster, in the county of Middlesex), between one J. L. and one J. W., in a certain plea of trespass and assault, in which the said J. L. was plaintiff, and the said J. W. defendant. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and before the trial of the said issue as hereinafter mentioned, and whilst the same was depending, to wit, on the third day of July in the ninth year of the reign aforesaid, J. S., late of the parish of B., in the county of M., tailor, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly contriving and intending to pervert the due course of law and justice, and wickedly and maliciously contriving and intending unjustly to aggrieve the said J. L., the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then and there, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, corruptly, wickedly, and maliciously did solicit, suborn, instigate, and endeavour to persuade one J. N. to be and appear as a witness at the trial of the said

issue, for and on behalf of the said J. W., the defendant in the said issue, and upon the said trial falsely to swear and give in evidence, to and before the jurors which should be sworn to try the issue aforesaid, certain matters material and relevant to the said issue, and to the matters therein and thereby put in issue, in substance, and to the effect following, that is to say, that [the said J. W. (meaning the defendant in the issue aforesaid) did, on a certain day then past, to wit, on the tenth day of April in the year aforesaid, beat, wound, and bruise the said J. L., (meaning the plaintiff in the issue aforesaid), and did knock him, the said J. L., down, and with a large stick did then and there beat, wound, and bruise, and greatly disfigure the said J. L., whilst he was so down]. And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the sittings at *Nisi P ius*, holden after Trinity term aforesaid, at Westminster, in the county aforesaid, before the Right Honourable Thomas Lord Denman, her Majesty's chief justice assigned to hold pleas in the court of our said lady the Queen before the Queen herself, to wit, on the day and year first aforesaid, at Westminster aforesaid, in the county aforesaid, the issue aforesaid came on to be tried, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which said trial the said J. N., in consequence, and by the means, encouragement, and effect of the said wicked and corrupt subornation and procurement of the said J. S., did then and there appear as a witness for and on behalf of the said J. W., the defendant in the plea above mentioned, and was then and there duly sworn, and took his corporal oath upon the Holy Gospel of God, before the said Thomas Lord Denman, her Majesty's chief justice as aforesaid, that the evidence which he the said J. N. should give to the court there, and to the jury so sworn as aforesaid, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth, (he the said Thomas Lord Denman, chief justice as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said J. N.. in that behalf); and that at and upon the trial of the said issue so joined between the said parties as aforesaid, it then and there became and was a material question, whether the said J. W. assaulted and beat the said J. L.; and the said J. N. being so sworn as aforesaid, then and there, at the trial of the said issue, upon his oath aforesaid, falsely, corruptly, and wilfully, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said Thomas Lord Denman, chief justice as aforesaid, did depose and swear (amongst other things) in substance and to the effect following, that is to say; that [*here set out J. N.'s evidence, in substance the same as is above stated, where the subornation is charged*]: Whereas, in truth and in fact, the said J. W. did not, &c. [*so proceeding to assign the perjury, as in the precedent ante, p.* 567]; and whereas, in truth and in fact, the said J. S., at the time he so solicited, suborned, instigated, and endeavoured to persuade the said J. N., falsely and corruptly to swear as aforesaid, well knew that [*&c., pursuing the words in the assignments of perjury*]: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said third day of July, in the fourth year of the reign aforesaid, at the parish aforesaid, in the county aforesaid, did

unlawfully, corruptly, wickedly, and maliciously, suborn, and procure the said J. N. to commit wilful and corrupt perjury in and by his oath aforesaid, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said Thomas Lord Denman, chief justice as aforesaid, (the said Thomas Lord Denman then and there having sufficient and competent power and authority to administer the said oath to the said J. N.); to the great displeasure of Almighty God, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. (*See the precedents, C. C. C.* 379, 380; 4 *Went.* 234, 250). *By stat.* 23 *G.* 2, *c.* 11, *s.* 2, *in an indictment for subornation, it is "sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom the perjury was committed." Punishable in the same manner as perjury.* (*See ante, p.* 568).

### *Evidence.*

Prove the perjury committed, as directed *ante, p.* 571, for, unless this be proved, the defendant cannot be found guilty of the subornation; 1 *Hawk. c.* 69, *s*, 10; and the mere production of the record of J. N.'s conviction for the perjury (if he were convicted) would not, it seems, be sufficient evidence of the perjury having been committed. *R.* v. *Reilly*, 1 *Leach*, 454.

And prove the previous subornation, as laid in the indictment, namely, that the defendant solicited or procured J. N. to prove so and so upon the trial of the issue, knowing the same to be false, or that J. N., by giving such evidence, would be committing perjury.

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### *Particular Statutes applicable to Perjury.*

43 *G.* 3, *c.* 142, *ss.* 4, 26; 52 *G.* 3, *c.* 129, *ss.* 2, 7: *Government annuities.*—51 *G.* 3, *c.* 15, *ss.* 9, 10: *Exchequer bills.*—55 *G.* 3, *c.* 184, *ss.* 52, 53: *Stamps.*—7 & 8 *G.* 4, *c.* 53, *ss.* 29, 30, 31: *Excise.*—39 & 40 *G.* 3, *c.* 89, *s.* 36: *Naval Stores.*—11 *G.* 4 & 1 *W.* 4, *c.* 20, *ss.* 85, 86; 7 *G.* 4, *c.* 16, *s.* 16: *Naval and military pay, pensions, &c.*—6 *G.* 4, *c.* 78, *s.* 29: *Quarantine.*—6 *G.* 4, *c.* 125, *s.* 80: *Pilotage.*—5 & 6 *Vict. c.* 42, *s.* 7: *Perjury before slave-trade commissioners.*—6 *G.* 4, *c.* 16, *s.* 99; 5 & 6 *Vict. c.* 122, *s.* 81: *Bankrupts.*—7 *G.* 4, *c.* 57, *s.* 71; 1 & 2 *Vict. c.* 110, *s.* 100: *Insolvents.*—2 & 3 *A. c.* 4, *ss.* 18, 19: *Registry Act.*—41 *G.* 3, *c.* 109, *s.* 43: *Inclosure Act.*—6 & 7 *Vict. c.* 18, *s.* 81; 5 & 6 *W.* 4, *c.* 76, *s.* 34: *Giving false answers at elections, parliamentary and municipal*; (as to which see *R.* v. *De Beauvoir*, 7 *C.* & *P.* 17: *R.* v. *Harris*, *Id.* 253: *Reg.* v. *Dodsworth*, 8 *C.* & *P.* 218: *Reg.* v. *Lucy*, *C.* & *Mar.* 511: *Reg.* v. *Bowler*, *Id.* 559: *Reg.* v. *Ellis*, *Id.* 564: *Reg.* v. *Spalding*, *Id.* 568).—*Making false oaths or declarations for the purpose of marriage*: 3 *G.* 4, *c.* 75, *s.* 10; 6 & 7 *W.* 4, *c.* 85, *s.* 38. *Making false declarations in matters relating to the revenues of customs or excise, stamps and taxes, or post-office; at the Bank of England, and in*

*other cases;* 5 & 6 *W.* 4, *c.* 62, *ss.* 5, 18, 21 : *see Reg.* v. *Boynes,* 1 *C. & K.* 65. *Making wilfully untrue statements respecting the state of lunatic asylums;* 8 & 9 *Vict. c.* 100, *s.* 27.

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## SECT. 6.

### ADMINISTERING, &c., VOLUNTARY OATHS, &c.

*Statute.*

5 & 6 *W.* 4, *c.* 62, *s.* 13]—*Recites, that a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received; and that doubts have arisen whether or not such practice is illegal; and for the more effectual suppression of such practice and removing such doubts,* enacts, that from and after the commencement of this act it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognisance by some statute in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.

Sect. 6—*Act not to apply to Oath of Allegiance*]—Provided always, that nothing in this act contained shall extend or apply to the oath of allegiance in any case in which the same now is or may be required to be taken by any person who may be appointed to any office, but that such oath of allegiance shall continue to be required, and shall be administered and taken, as well and in the same manner as if this act had not been passed.

Sect. 7—*Not to apply to Oaths in Courts of Justice, &c.*]—Provided also, that nothing in this act contained shall extend or apply to any oath, solemn affirmation, or affidavit, which now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace, but all such oaths, affirmations, and affidavits shall continue to be required, and to be administered, taken, and made, as well and in the same manner as if this act had not been passed.

### *Indictment.*

*Commencement as ante, p.* 169]—at the county aforesaid, he the said J. S., then, to wit, on the day and year aforesaid, being one of the justices of our said lady the Queen, assigned to keep the peace in and for the said county, did unlawfully administer to and receive from a certain person, to wit, one J. N., a certain oath [" *oath, affidavit, or solemn affirmation*"], touching certain matters and things whereof the said J. S., at the time and on the occasion aforesaid, had not any jurisdiction or cognisance by any statute in force at the time being, to wit, at the time of administering and receiving the said oath; the same oath not being in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of any offence, or touching any proceedings before either of the Houses of Parliament, or any committee thereof respectively, nor being an oath required by the laws of any foreign country to give validity to any instrument in writing, designed to be used in such foreign country; that is to say, a certain oath touching and concerning [*state the subject-matter of the oath, so as to shew that it was not one of which the justice had jurisdiction or cognisance, and was not within the exceptions*]: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.—*The indictment must negative the exceptions in the statute, and must shew the subject matter touching which the oath was administered, so as to enable the court to draw the legal inference that it was one of which the defendant had not cognisance; but it is not necessary to set out the oath verbatim. Reg.* v. *Nott,* 1 *Dav. & M.* 1; *C. & Mar.* 288.

*Misdemeanor, fine, or imprisonment, or both.* 5 & 6 *W.* 4, *c.* 62, *s.* 13. *This offence is not triable at the quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove that the defendant is a justice of the peace for the county mentioned in the indictment; evidence of his acting as such will primâ facie be sufficient. Prove that he administered to or received from J. N. an oath of the nature and touching the subject-matter mentioned in the indictment. It is not necessary to shew that he acted *wilfully* in contravention of the statute; the doing so, even inadvertently, is punishable. *Reg.* v. *Nott, supra.*

## SECT. 7.

## BRIBERY.

### *Indictment for attempting to bribe a Constable.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of B., in the county of M., one A. C., esquire, then and yet

being one of the justices of our said lady the Queen, assigned to keep the peace for our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to all constables and other peace officers of the said county, and especially to J. N., thereby commanding them, upon sight thereof, to take and bring before him the said A. C., so being such justice as aforesaid, or some other of his Majesty's justices of the peace for the said county, the body of D. F., late of the parish aforesaid, in the county aforesaid, to answer, [*&c. &c., as in the warrant*]; and which said warrant afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, was delivered to the said J. N., then being one of the constables of the same parish, to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice, and to prevent the said D. F. from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wickedly, and corruptly did offer unto the said J. N., so being constable as aforesaid, and having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of ten pounds, if he the said J. N. would refrain from executing the said warrant, and from taking and arresting the said D. F. under and by virtue of the same, for and during fourteen days from that time, that is to say, from the time he the said J. S. so offered the said sum of ten pounds to the said J. N. as aforesaid: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. N., on the said third day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, in manner and form aforesaid, did attempt and endeavour to bribe the said J. N., so being constable as aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said D. F. under and by virtue of the warrant aforesaid: in contempt of our lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Punishable with fine and imprisonment, whether the bribe were accepted or not,* 3 *Inst.* 147; *and see R.* v. *Vaughan,* 4 *Bur.* 2500. *And the same, where an officer, judicial or ministerial, takes a bribe. Id.; and see* 20 *Ed.* 3, *c.* 1; *Com. Dig. Officer* (I). *The text books, in general, confine the offence of bribery to a bribery of judicial officers; but this definition of the offence seems too narrow and confined. See R.* v. *Beale,* 1 *East,* 183, *cit.*: *R.* v. *Vaughan,* 4 *Bur.* 2494. *See* 7 *&* 8 *W.* 3, *c.* 4; 2 *G.* 2, *c.* 24; 1 *B. & C.* 297; 49 *G.* 3, *c.* 118; 5 *&* 6 *W.* 4, *c.* 76, *s.* 54; 5 *&* 6 *Vict. c.* 102, *ss.* 20, 21, 22: *Henslow* v. *Fawcett,* 3 *Ad. & Ell.* 51: *Harding* v. *Stokes,* 2 *M. & W.* 233, *as to bribery at elections, parliamentary and municipal;—and* 8 *&* 9 *Vict. c.* 85, *s.* 8: *R.* v. *Everette,* 8 *B. & C.* 114; 2 *Man. & Ry.* 35, *as to bribing officers of the customs.*

*Evidence.*

Prove the warrant, and the delivery of it to J. N.; and prove that J. S. knew that J. N. had the warrant, and offered him ten pounds to refrain from executing it, as stated in the indictment.

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SECT. 8.

EXTORTION.

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*Indictment against a Constable for Extortion.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., baker, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, then being one of the constables of the said parish, at the parish aforesaid, in the county aforesaid, did take and arrest one J. N., by colour of a certain warrant, commonly called a bench warrant, which he the said J. S. then and there alleged to be in his possession; and that the said J. S. afterwards, and whilst the said J. N. so remained in his custody as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, corruptly, deceitfully, extorsively, and by colour of his said office, did extort, receive, and take of and from the said J. N. the sum of five shillings, as and for a fee due to him the said J. S. as such constable as aforesaid, for the obtaining and discharging of the said warrant, as he the said J. S. then and there alleged; whereas, in truth and in fact, no fee whatever was then due from the said J. N. to the said J. S. as such constable as aforesaid in that behalf; in contempt of our said lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *The venue may be laid in any county.* 31 *El. c.* 5, *s.* 4. *See the precedents, Cro. Circ. Com.* 193, 194, 195; 4 *Went.* 146: *and see* 3 *Inst.* 148, 149; 2 *L. Raym.* 1265; 2 *Salk.* 680; 4 *Camp.* 379.

*Fine or imprisonment, or both. And it is equally extortion, where a greater fee is exacted than what is legally due, as where money is exacted as a fee where none whatever is payable. See* 2 *Salk.* 680; 1 *Hawk. c.* 68, *s.* 1.

*Evidence.*

Prove the arrest, and prove that the defendant exacted money as a fee due to him, as stated in the indictment. The sum stated is not material; proof of a less sum will maintain the indictment. *R.* v. *Burdett*, 1 *L. Raym*, 149; *and see R.* v. *Gilham*, 6 *T. R.* 267: *R.* v. *Higgins*, 4 *C. & P.* 247.

## Sect. 9.

### MISCONDUCT OF OFFICERS OF JUSTICE.

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*Indictment against a Constable for not conveying an Offender to Prison.*

*Proceed as in the precedent ante, p. 550, as far as the *, and then proceed thus*]:—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, baker, so being one of the constables of the said parish as aforesaid, and being so commanded by the said A. C. the said justice, as aforesaid, then and there unlawfully and contemptuously did neglect and refuse to convey the said J. N. to the said gaol of Newgate, as he the said J. S. by virtue of his office aforesaid, by law should and ought to have done: to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *See the precedents, Cro. Circ. Com.* 143, 151, 170.

*Every malfeasance or culpable nonfeasance of an officer of justice, with relation to his office, is a misdemeanor, and punishable with fine or imprisonment, or both. See* 1 *Salk.* 380; *Cro. El.* 654.

*Evidence.*

Prove the charge before the magistrate, the warrant, and the delivery of it to the defendant, as directed *ante, p.* 551. And prove that the defendant neglected or refused to convey the offender to prison, in pursuance of the warrant. It is unnecessary to prove the defendant's appointment as constable; proof that he was accustomed to act as such will be sufficient. (*Ante, p.* 124).

*Indictment against a Magistrate, for committing in a Case where he had no Jurisdiction.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of B., in the county of M., one T. C., then being one of the constables of the said parish, brought one J. N. before J. S., esquire, then and yet being one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said J. N. then and there was charged before the said J. S. with having committed a certain supposed misdemeanor, in having vilified the character and hurt the trade of one A. C., of the parish aforesaid, miller; and the said J. N. was then and there examined before the said J. S., as such justice as aforesaid, touching the said supposed offence so to him charged as aforesaid. And the jurors aforesaid upon their oath aforesaid do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, esquire, being

such justice as aforesaid, wickedly and maliciously contriving and intending to oppress, injure, and aggrieve the said J. N. in his behalf, and to put him to great charge and expense, and to cause him to undergo and suffer great pain, torture, and anguish of body and mind, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did order and direct that the said J. N. should find sureties for his personal appearance at the then next general quarter sessions of the peace of our said lady the Queen, to be holden in and for the said county of M. to answer the said charge; and, because the said J. N. did not and could not conveniently find such sureties as aforesaid, he the said J. S., being such justice as aforesaid, wickedly and maliciously contriving and intending as aforesaid, wrongfully, unjustly, and maliciously, and contrary to the laws of this realm, then and there (by virtue and under colour of a certain warrant under his hand and seal, as such justice as aforesaid) did commit the said J. N. a prisoner to a certain prison called the House of Correction, situate at the parish aforesaid, in the county aforesaid, to be there safely kept until he the said J. N. should find such sureties as aforesaid, and until he should be fully examined concerning the premises; and then and there ordered, directed, and commanded the then keeper of the said prison to keep the said J. N. under close confinement in the said prison, and to deny him the use of pen, ink, and paper, and to allow no letter to be delivered to or from the said J. N., and also to allow no person to see or speak to him the said J. N. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., by virtue and under colour of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, and from thence for a long space of time, to wit, for the space of ten days then next following, at the parish aforesaid, in the county aforesaid, wrongfully, unjustly, and maliciously, and contrary to the laws of this realm, did cause and procure the said J. N. to be closely confined and imprisoned in the said prison, and to be denied the use of pen, ink, and paper, and to be restrained from all communication with his relations and friends, to wit, at the parish aforesaid, in the county aforesaid; whereby the said J. N. during all that time underwent and suffered great pain, torture, and anguish of body and mind, and was deprived of his liberty, and prevented from finding such sureties as aforesaid, and was put to great charge and expense in and about obtaining his discharge and release from the said commitment and imprisonment; to the great scandal of the administration of justice in this kingdom, in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Where magistrates are guilty of oppression, or other wilful malfeasance in the execution of their duties, they are generally proceeded against by information. But such an information can readily be framed from this precedent by observing the forms given ante, p.* 77. *See the precedents, Cro. Circ. Com.* 242, 244; 4 *Went.* 364, 418, 424; 6 *Went.* 455. *See also a precedent of an indictment against a coroner for refusing to take an inquisition. Cro. Circ. Com.* 170.

*Fine, or imprisonment, or both.*

### *Evidence.*

Prove the charge before J. S., the warrant, &c., and the imprisonment; together with any circumstance of aggravation laid in the indictment. Also, if the case will admit of it, evidence may be given of any circumstances which indicate that the commitment proceeded from malice, or other undue motive upon the part of the magistrate. *See R.* v. *Sainsbury*, 4 *T. R.* 451.

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## SECT. 10.

### NOT OBEYING THE ORDERS OF A MAGISTRATE.

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### *Indictment against a High Constable for disobeying an Order of Sessions.*

Middlesex, to wit:—The jurors of our lady the Queen upon their oath present, that, at the general quarter sessions of the peace of our lady the Queen, holden for the county of Middlesex, at the New Sessions House on Clerkenwell Green, in and for the county aforesaid, by adjournment, to wit, on Saturday, the twentieth day of July, in the ninth year of the reign of our sovereign lady Victoria, before F. C., J. W., W. R., and R. M., esquires, and others their fellows, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the same county, it was ordered by the same justices and court there, that [*&c., proceeding to state the order of sessions in the past tense*], as by the said order, reference being thereunto had, will more fully and at large appear; of which said order the said J. S., one of the high constables in the order aforesaid named, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, had notice. Nevertheless, the said J. S., late of the parish aforesaid, in the county aforesaid, gentleman, then being one of the high constables in the order aforesaid mentioned, unlawfully and contemptuously, upon being served with the said order, did neglect and refuse to [*&c. here insert what the order required of him*], as by the said order he the said J. S. was required to do; nor hath he the said J. S. at any time since complied with the said order, although often requested so to do; in contempt of our lady the Queen and her laws, to the evil example of other persons in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*See a precedent of an indictment against an overseer of the poor, for not paying a weekly sum to a pauper in pursuance of an order of justices; Cro. Circ. Com.* 327; *see R.* v. *Meredith, R. & R.* 46: *R.* v. *Booth, Id.* 47: *R.* v. *Warren*, 2 *Russ.* 139;—*and against the father of a bastard child, for not obeying an order of maintenance*; 4 *Went.* 227; *and see R.* v. *White, Cald.* 183: *R.* v. *Robinson*, 2 *Bur.* 799; *R.* v.

*Balme*, *Cowp.* 650: *R.* v. *Fearnley*, 1 *T. R.* 316: *R.* v. *Davis*, *Say.* 163: *R.* v. *Gould*, 1 *Salk.* 381.

*Evidence.*

Produce the order. Prove a personal service of a copy of it upon the defendant, and upon all the defendants, if there be more than one, and the order be joint and not several. *See R.* v. *Kingston*, 8 *East*, 41. And prove that the defendant did not obey the order. *See R.* v. *Fearnley*, 1 *T. R.* 316.

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## Sect. 11.

### COMPOUNDING FELONY.

*Statute.*

7 & 8 *G.* 4, *c.* 29, *s.* 58]—Enacts, that every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

Sect. 59—*Advertising Reward for the Return of stolen Property*]—Enacts, that if any person shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or if any person shall print or publish any such advertisement; in any of the above cases, every such person shall forfeit the sum of fifty pounds for every such offence, to any person who shall sue for the same by action of debt, to be recovered with full costs of suit.

Sect. 57—*Restitution of Property*]—To encourage the prosecution of offenders, enacts, that if any person, guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting,

or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner, or his representative; and the court, before whom any such person shall be so convicted, shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear, before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security. *See R.* v. *Stanton*, 7 *C. & P.* 481: *R.* v. *Powell*, *Id.* 640.

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*Indictment for compounding a Felony.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of B., in the county of M., one A., the wife of J. N., feloniously stole, took, and carried away one silver spoon, of the value of twenty shillings, of the goods and chattels of one J. S., against the peace of our lady the Queen, her crown and dignity. And that the said J. S., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the said felony to have been by the said A. so as aforesaid done and committed, but contriving and intending unlawfully and unjustly to pervert the due course of law and justice in that behalf, and to cause and procure the said A., for the felony aforesaid, to escape with impunity, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, and for wicked gain's sake, did compound the said felony with the said J. N., the husband of the said A., and then and there did exact, take, receive, and have of the said J. N. the sum of twenty-six shillings, for and as a reward for compounding the said felony and desisting from all further prosecution against the said A. for the felony aforesaid; and that the said J. S., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did thereupon desist, and from that time hitherto hath desisted, from all further prosecution of the said A. for the felony aforesaid; to the great hindrance of justice, in contempt of our lady the Queen and her laws, and against the peace of our lady the Queen, her crown and dignity. *See the precedent*, 4 *Went.* 327.

*Fine and imprisonment. See* 1 *Hawk. c.* 59, *s.* 5, *&c. As to compounding informations on penal statutes, see* 18 *Eliz. c.* 5: *R.* v. *Stone*, 4 *C. & P.* 379: *R.* v. *Gotley*, *R. & R.* 84: *R.* v. *Crisp.* 1 *B. & Ald.* 282. *A person may be convicted under that statute, for taking money as a reward for forbearing to prosecute, although in fact no offence liable to*

*a penalty have been committed by the person from whom the money is taken.* *Reg.* v. *Best*, 2 *Mood. C. C.* 125; 9 *C. & P.* 368.

### *Evidence.*

Prove the felony to have been committed by A. N., as directed *ante*, *p.* 170; and prove that J. S. received twenty-six shillings, or some part thereof, from J. N. upon an understanding that J. S. would not further prosecute A. N. for the felony; and that in fact he has not further prosecuted her since for the same.

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### *Indictment for taking a Reward for the Recovery of stolen Property.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, corruptly and feloniously did take and receive from J. N. certain money and reward, to wit, the sum of five pounds of the monies of the said J. N., under pretence, ("*under pretence, or upon account*") then and there of helping the said J. N. to certain goods and chattels ("*chattels, money, or valuable security*") of him the said J. N., before then feloniously stolen, taken, and carried away, ("*by any felony or misdemeanor stolen, taken, obtained, or converted*") the said J. S. not having caused the said person by whom the said goods and chattel were so stolen, taken, and carried away as aforesaid, to be apprehended and brought to trial for the same; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life or for not less than seven years, or imprisonment (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 58. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove that the goods, &c., were stolen or obtained in the mode stated in the indictment; and prove that the defendant received the money from J. N., or some person on his behalf, upon the pretence or account stated in the indictment. It was decided to be an offence within the repealed stat. 4 *G.* 1, *c.* 11, *s.* 4, which was similar to the present section, to take money under pretence of helping a man to goods stolen from him, though the defendant had no acquaintance with the felon, and did not pretend that he had; and though he had no power to apprehend the felon, and though the goods were never restored, and the defendant had no power to restore them. *R.* v. *Ledbitter*, 1 *Mood, C. C.* 76. As to advertising a reward for the return of stolen property, *see* 7 *&* 8 *G.* 4, *c.* 29, *s.* 59, (*ante, p.* 585).

## Sect. 12.

### LIBELS REFLECTING ON THE ADMINISTRATION OF JUSTICE.

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*Indictment for a Libel against a Judge and Jury, in the Execution of their Duties.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the sittings at *Nisi Prius*, holden after Trinity Term, to wit, on the twentieth day of June, in the eighth year of the reign of our sovereign lady Victoria, at Westminster, in the county of Middlesex, before the Right Honourable Sir Frederick Pollock, chief baron of our said lady the Queen of her Court of Exchequer at Westminster aforesaid, a certain issue duly joined in the said court between one A. B. and one C. D., in a certain action on promises, in which the said A. B. was plaintiff, and the said C. D. defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly sworn, and taken between the parties aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S. late of the parish of B., in the county of M., printer, being a wicked and ill-disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the said Sir Frederick Pollock, and the jurors, by whom the said issue was so tried as aforesaid, and to cause it to be believed that [*here state the effect of the libel; see ante, p.* 525] on the twenty-first day of June, in the year last aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, wickedly and maliciously did write and publish, and cause and procure to be written and published a certain false, wicked, malicious, and scandalous libel, of and concerning the administration of justice in this kingdom, and of and concerning the trial of the said issue, and of and concerning the said Sir Frederick Pollock, and the jurors by whom the said issue was so tried as aforesaid, according to the tenor and effect following; that is to say: [*here set out the libel, together with such innuendoes as may be requisite; see ante, p.* 525]: to the great scandal and reproach of the administration of justice in this kingdom, in contempt of our lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine or imprisonment, or both. See R.* v. *White,* 1 *Camp.* 359: *R.* v. *Watson,* 2 *T. R.* 199. *This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69). *As to the evidence, see ante, p.* 524.

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*Indictment for Slanderous Words to a Magistrate.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the

parish of B., in the county of M., one J. S. was brought before J. N., esquire, then and yet being one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, and the said J. S. was then and there charged before the said J. N., upon the oath of one A. C., that he the said J. S. had then lately before feloniously taken, stolen, and carried away divers goods and chattels of the said A. C. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a scandalous and ill-disposed person, and wickedly and maliciously intending and contriving to scandalize and vilify the said J. N. as such justice as aforesaid, and to bring the administration of justice in this kingdom into contempt, afterwards, and whilst the said J. N., as such justice as aforesaid, was examining and taking the depositions of divers witnesses against him the said J. S. in that behalf, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our lady the Queen, did publish, utter, pronounce, declare, and say, with a loud voice to the said J. N., and whilst he the said J. N. was so acting as such justice as aforesaid, "You are a scoundrel and a liar; you would hang your own father if you could make a groat by his execution;" to the great scandal and reproach of the administration of justice in this kingdom, to the great scandal and damage of the said J. N., in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine or imprisonment, or both. See R.* v. *Pocock,* 2 *Str.* 1157: *R.* v. *Weltje,* 2 *Camp.* 142; *and see* 2 *Salk.* 698. *If there be any doubt as to the words, lay them differently in different counts.*

*Evidence.*

Prove the charge before the magistrate; and prove that whilst the magistrate was in the execution of his duty, taking the depositions of the witnesses, the defendant addressed him, and spoke the words laid in some one of the counts of the indictment. It is sufficient to prove that the magistrate acted as such. *Berryman* v. *Wise,* 4 *T. R.* 366: *R.* v. *Gordon,* 1 *Leach,* 581. As to the proof of the words, *see ante, p.* 102.

# CHAPTER III.

## OFFENCES AGAINST THE PUBLIC PEACE.



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## SECT. 1.

### RIOT.

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*Statute.*

3 *G.* 4, *c.* 114—*Hard labour for Riot and certain other Offences*]—*Recites* 53 *G.* 3, *c.* 162, and enacts, that, whenever any person shall be convicted of any of the offences hereafter specified and set forth; that is to say, . . . . any attempt to commit felony; any riot; . . . . . keeping a common gambling-house, a common bawdy-house, or a common ill-governed and disorderly house; wilful and corrupt perjury, or of subornation of perjury; . . . . . . in each and every of the above cases, and whenever any person shall be convictedof any or either of the aforesaid offences, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders, by any law in force before the passing of this act; and every such offender shall thereupon suffer such sentence, in such place and for such time as aforesaid, as such court shall think fit to direct. [*Repealed, so far as relates to receiving stolen goods and false pretences, by* 7 & 8 *G.* 4, *c.* 27, *s.* 1, *and so far as relates to assault, &c., by* 9 *G.* 4, *c.* 31, *s.* 1.]

*Indictment for Riot and Assault.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, J. W., late of the same place, carpenter, E. W., late of the same place, yeoman, together with divers other evil-disposed persons,

to the number of ten and more, to the jurors aforesaid unknown, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, riotously, and routously, did assemble and gather together, to disturb the peace of our said lady the Queen; and being so then and there assembled and gathered together, in and upon one A., the wife of J. N., in the peace of God and of our lady the Queen then and there being, unlawfully, riotously, and routously did make an assault, and her the said A. then and there unlawfully, riotously, and routously did beat, wound, and ill-treat, so that her life was greatly despaired of; and other wrongs to the said A. then and there unlawfully, riotously, and routously did, to the great disturbance and terror of the liege subjects of our lady the Queen then and there being, in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. (*See the precedents, Cro. Circ. Com.* 413 *et seq.;* 4 *Went.* 150, 305 *et seq.*) *You may add a count for a common assault.* (*See ante, p.* 441).

*Fine or imprisonment, or both, and, by* 3 *G.* 4, *c.* 114, *hard labour.*

*Evidence.*

*That J. S., &c., together with divers others.*]—It must be proved that three persons at least were engaged in this unlawful assembly and assault, otherwise the defendants must be acquitted; for unless committed by three or more, it is no riot. 2 *Hawk. c.* 47, *s.* 8; *R.* v. *Scott*, 3 *Bur.* 1262; 1 *W. Bl.* 291, 350: *R.* v. *Sadbury*, 1 *L. Raym.* 484; 2 *Salk.* 593.

*Unlawfully, riotously, and routously did assemble.*]—It must be proved that these three or more persons assembled together; and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror; *R.* v. *Hughes*, 4 *C. & P.* 372; such as being armed, using threatening speeches, turbulent gestures, or the like. 1 *Hawk. c.* 65, *s.* 5. If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit. *Ib.*; *Lamb.* 178; *Dalt. c.* 137. It is a sufficient terror and alarm, however, to sustain the indictment, if *any one* of the Queen's subjects be in fact terrified. *Reg.* v. *Phillips*, 2 *Mood. C. C.* 252; *S. C., as Reg.* v. *Langford, C. & Mar.* 602. If persons meet at a fair or wake, or on any other lawful and innocent occasion, and on a sudden quarrel they fight together, this is no riot, but an affray merely; but if, upon a dispute arising, they form themselves into parties, with promises of mutual assistance, and then fight, it is a riot; for, in this latter case, the design to break the peace is as premeditated as if they had originally met for that purpose. 1 *Hawk. c.* 65, *s.* 3.

It is not necessary, to constitute a riot, that the riot act should be read. Before the proclamation can be read, a riot must exist; and the effect of the proclamation will not change the character of the meeting, but will make those guilty of a felony who do not disperse

within one hour after the proclamation is read. *R.* v. *Furzey*, 6 *C. & P.* 81.

*In and upon one A. did make an assault, &c.*]—Prove the assault and battery, as directed *ante, p.* 442. And this must be proved, otherwise the defendants must be acquitted. For, where persons assemble together for the purpose of doing an act, and the assembly is such as is above described, if they do not proceed to execute their purpose, it is but an unlawful assembly, not a riot; if, after so assembling, they proceed to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only so assemble, but proceed to execute their design, and actually execute it, it is then a riot. 1 *Hawk. c.* 65, *s.* 1; *Dalt. c.* 136; *R.* v. *Birt*, 5 *C. & P.* 154: *Reg.* v. *Vincent*, 9 *C. & P.* 91.

It is immaterial, however, whether the act done be unlawful or not; doing it in a manner calculated to inspire people with terror, is equally punishable, whether it be lawful or otherwise. 1 *Hawk. c.* 65, *s.* 7. Yet, where the object of the assembly is lawful, it in general requires stronger evidence of the terror of the means, to induce a jury to return a verdict of guilty, than if the object were unlawful: and it has even been holden, that, if a number of persons assemble for the purpose of abating a public nuisance, and appear with spades, iron crows, and other tools for that purpose, and abate it accordingly, without doing more, it is no riot, *Dalt. c.* 137, unless threatening language or other misbehaviour, in apparent disturbance of the peace, be at the same time used. *Ib.*

If the offence proved against the defendants amount to a constructive levying of war, (*see ante, p.* 493), they must be acquitted.

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## *Indictment for a Riot and Tumult.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, J. W., late of the same, carpenter, E. W., late of the same, yeoman, together with divers other evil-disposed persons, to the number of fifty and more, to the jurors aforesaid unknown, on the third day of August, in the fourth year of the reign of our sovereign lady Victoria, with force and arms, to wit, with sticks, staves, and other offensive weapons, at the parish aforesaid, unlawfully, riotously, and routously did assemble and gather together to disturb the peace of our said lady the Queen, and being so assembled and gathered together, armed as last aforesaid, did then and there unlawfully, riotously, and routously make a great noise, riot, and disturbance, and did then and there remain and continued armed as last aforesaid, making such noise, riot, and disturbance, for the space of an hour and more then next following, to the great disturbance and terror not only of the liege subjects of our said lady the Queen there being and residing, but of all other the liege subjects of our said lady the Queen then passing and repassing in and along the Queen's common highway there: in contempt of our said lady the Queen and her laws, to the evil example of all others in the like

case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine or imprisonment, or both; and, by* 3 *G.* 4, *c.* 114, (*ante, p.* 590) *hard labour. As to the evidence, see ante, p.* 591.

RIOTERS REMAINING ONE HOUR TOGETHER AFTER PROCLAMATION.

*Statute.*

1 *G.* 4, *st.* 2, *c.* 5, *s.* 1—*Rioters remaining one Hour after Proclamation.*]—Whereas of late many rebellious riots and tumults have been in divers parts of this kingdom to the disturbance of the public peace, and the endangering of his Majesty's person and government, and the same are yet continued and fomented by persons disaffected to his Majesty, presuming so to do, for that the punishments provided by the laws now in being are not adequate to such heinous offences; and by such rioters, his Majesty and his administration have been most maliciously and falsely traduced, with an intent to raise divisions, and to alienate the affections of the people from his Majesty; therefore, for the preventing and suppressing of such riots and tumults, and for the more speedy and effectual punishing the offenders therein, be it enacted, &c., that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, at any time after the last day of July, in the year of our Lord 1715, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate where such assembly shall be, by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together for the space of one hour after such command or request made by proclamation, that then such continuing together, to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy.

Sect. 2—*Form of Proclamation*]—Enacts, that the order and form of the proclamation that shall be made by the authority of this act shall be as hereafter followeth; (that is to say), the justice of the peace, or other persons authorized by this act to make the said proclamation, shall among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be, while proclamation is making, and after that, shall openly, and with a loud voice, make or cause to be made, proclamation of these words, or like in effect:—

"Our sovereign lord the King chargeth and commandeth all

persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies.

"God save the King."

And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head officer aforesaid, within the limits of their respective jurisdictions, are hereby authorized, empowered, and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assemblies shall be of persons to the number of twelve or more, and there to make, or cause to be made, proclamation in manner aforesaid.

Sect. 5—*Opposing Proclamation*]—Provides and enacts, that i any person or persons do or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any other manner wilfully or knowingly let, hinder, or hurt, any person or persons that shal begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering, or hurting such person or persons so beginning or going to make such proclamation as aforesaid, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy; and that, also, every such person or persons, so being unlawfully, riotously, and tumultuously assembled to the number of twelve as aforesaid, or more, to whom proclamation should or ought to have been made if the same had not been hindered as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made, shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy.

Sect. 8—*Limitation of Proceedings*]—Provides, that no person or persons shall be prosecuted by virtue of this act, for any offence or offences committed contrary to the same, unless such prosecution be commenced within twelve months after the offence committed.

7 *W.* 4 & 1 *Vict. c.* 91, *s.* 1]—*Recites the stat.* 1 *G.* 1, *c.* 5, and enacts, that if any person shall, after the commencement of this act, (1 Oct. 1837), be convicted of any of the offences therein mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

### *Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, J. W., late of the same, carpenter, E. W., late of the

same, yeoman, together with divers other evil-disposed persons, to the number of twelve or more, to the jurors aforesaid unknown, on the third day of August, in the fourth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, riotously, and tumultuously did assemble together, to the disturbance of the public peace :* And the said J. S., J. W., E. W., and the said other persons to the jurors aforesaid unknown, being so unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace as aforesaid, afterwards, and whilst they were so assembled as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, one A. C., esquire, (then being one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county), as near to them the said J. S., J. W., E. W., and the said other persons to the jurors aforesaid unknown, so unlawfully, riotously, and tumultuously assembled as aforesaid, as he the said A. C. could then and there safely come, did then and there command, and cause to be commanded, silence to be while proclamation was making, and that the said A. C., after that, did then and there, as near to them the said J. S., J. W., E. W., and the said other persons so assembled as aforesaid, as he the said A. C. could then and there safely come, openly, and with a loud voice, make and cause to be made proclamation (according to the form of the statute in such case made and provided) in these words following, that is to say: "Our sovereign lady the Queen chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the act made in the first year of the reign of King George the First, for preventing tumults and riotous assemblies. God save the Queen." And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W., E. W., and the said other persons, to the number of twelve and more, to the jurors aforesaid unknown, being so required and commanded by the said A. C., the justice aforesaid, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, did then and there, to the number of twelve and more, with force and arms, notwithstanding the said proclamation so made as aforesaid, feloniously, unlawfully, riotously, and tumultuously remain and continue together for the space of one hour after such command so made by the said proclamation as aforesaid: in contempt of our said lady the Queen and her laws, to the great disturbance and terror of the quiet and peaceable subjects of our said lady the Queen, to the evil example of all others in the like case offending, against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Care must be taken to set out the proclamation correctly. Where the indictment omitted the words "of the reign of," in setting out the proclamation, Patteson, J., held the variance to be fatal. R.* v. *Woolcock, 5 C. & P.* 516.

*Felony.* 1 *G.* 1, *st.* 2, *c.* 5, *s.* 1. *Transportation for life or for not less than fifteen years, or imprisonment not exceeding three years, 7 W.* 4 *&* 1 *Vict. c.* 91, *s.* 1, *with or without hard labour, and with or*

*without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Id. s.* 2, (*ante, p.* 468). *Opposing the making of the proclamation is also felony,* 1 *G.* 1, *st.* 2, *c.* 5, *s.* 5, *subject to the same punishment.*

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

1. Prove that the defendants, together with others, to the number of twelve, at least, were "unlawfully, riotously, and tumultuously" assembled together "to the disturbance of the public peace." It does not seem from these words of the statute that it is necessary that a riot should have actually been committed; it seems to be sufficient that the assembly was of such a nature, and gathered together under such circumstances, that if they had done the act for the purpose for which they were assembled, it would have been a riot. *R.* v. *James,* 5 *C. & P.* 153.

2. Prove that silence was commanded, and proclamation made, as stated in the indictment. The proclamation must be read correctly. Where the magistrate in reading the proclamation omitted the words "God save the King," it was holden that persons remaining after the proclamation could not be capitally convicted. *R.* v. *Child,* 4 *C. & P.* 442.

3. Prove that the defendants, together with others, to the number of twelve or more, "unlawfully, riotously, and tumultuously" remained and continued together for one hour or more after proclamation so made.

4. Prove that the prosecution was commenced within twelve (lunar) months after the offence committed. 1 *G.* 1, *st.* 2, *c.* 5, *s.* 8.

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## RIOTOUSLY BEGINNING TO DEMOLISH A HOUSE, &c.

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### *Statutes.*

7 *&* 8 *G.* 4, *c.* 30, *s.* 8]—Enacts, that if any persons riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the united Church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine, or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

4 *& 5 Vict. c. 56, s. 2—Commutation of Punishment*]—*Recites the 7 & 8 G.* 4, *c.* 30, *s.* 8, *and* enacts, that from and after the commencement of this act, [1st Oct. 1841], if any person shall be convicted of any of the offences hereinbefore last specified, whether as principal, or as principal in the second degree, or as accessary before the fact, such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said act hereinbefore last recited ordered to be given or awarded against persons convicted of the said last-mentioned offences, or any of them respectively, be liable, at the discretion of the court, to be transported beyond the seas for any term not less than seven years, or to be imprisoned for any time not exceeding three years.

Sect. 4—*Place and Mode of Punishment*]—Enacts, that in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such punishment to be with or without hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, whether the same be with or without hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

6 *& 7 Vict. c.* 10]—*Recites the* 4 *& 5 Vict. c.* 56, *s.* 2, *and that doubts have arisen whether such offenders are liable, under the provisions of that act, to be transported beyond the seas for the term of their natural lives, and that it is expedient to put an end to such doubts; and* enacts, that from and after the passing of this act, if any person shall be convicted of any of the offences hereinbefore specified, such person shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any time not exceeding three years.

## *Indictment.*

*Proceed as in the last precedent, to the**, *and then thus*]:—and being then and there so unlawfully, riotously, and tumultuously assembled together as aforesaid, did then and there feloniously, unlawfully, and with force, begin to demolish and pull down the dwelling-house of one J. N., there situate: ("*any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine, or other engine, for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk, for conveying minerals from any mine*"); in contempt of our lady the Queen and her laws, &c., *as in the conclusion of the last precedent. This indictment must conclude contra formam statutorum. Reg.* v. *Adams, C. & Mar.* 299.

*Felony, transportation for life or not less than seven years, or imprisonment not exceeding three years,* 4 *&* 6 *Vict. c.* 56, *s.* 2 ; 6 *&* 7 *Vict. c.* 10, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in one year.* 4 *&* 5 *Vict. c.* 56, *s.* 4.

*This offence is not triable at any quarter sessions.* 4 *&* 5 *Vict. c.* 56, *s.* 6 *; see also* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

## *Evidence.*

Prove the riotous assembly, as under the last precedent, except that the number of the persons composing it is not material, provided they be three at the least. Prove that the assembly began "with force ot demolish the house in question, and that it was the dwelling-house of J. N., and situate in the parish and county described in the indictment. It must appear that they began to demolish some part of the *freehold*: for instance, the demolition of moveable shop-shutters is not sufficient. *Reg.* v. *Howell,* 9 *C. & P.* 437. A demolition *by fire* is within the statute ; *Ib.;* so held also by *Tindal,* C. J. *Parke,* B., and *Rolfe,* B., on the Stafford Special Commission, 1842. *Reg.* v. *Harris, C. & Mar.* 661 *: Reg.* v. *Simpson, Id.,* 669. Prove that the defendants were either active in demolishing the house, or present aiding and abetting. The jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into effect, they would in point of fact have demolished it ; for if the rioters merely do an injury to the house, and then of their own accord go away, as having completed their purpose, it is not a beginning to demolish within the statute. *R.* v. *Thomas,* 4 *C. & P.* 237 : *R.* v. *Price,* 5 *C. & P.* 510 : *Reg.* v. *Howell,* 9 *C. & P.* 437 : *Reg.* v. *Adams, C. & Mar.* 299. But a *total* demolition is not necessary to satisfy the statute, though the parties were not interrupted ; it is enough if the house be destroyed *as a dwelling.* Therefore, the fact that the rioters left a chimney remaining will not prevent the statute from applying. *Reg.* v. *Phillips,* 2 *Mood. C. C.* 252 *; S. C., as Reg.* v. *Langford, C. & Mar.* 602.

Where a mob, after the obnoxious person had escaped, continued to attack a house until the police interfered, *Gurney,* B., left it to the jury to say whether they had not the intention to demolish the house as well as to injure the person ; and the jury, being of that opinion, found the defendants guilty. *R.* v. *Batt,* 6 *C. & P.* 329 *; see Reg.* v. *Howell,* 9 *C. & P.* 437.

If the demolition be in the *bonâ fide* assertion of a supposed, though unfounded, claim of right, it is not within the statute, though it be accompanied by a riot. *Reg.* v. *Phillips, and Reg.* v. *Langford, supra.*



## Sect. 2.

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### AFFRAY.

#### *Indictment for an Affray.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, and J. W., late of the same, carpenter, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, being unlawfully assembled together and arrayed in a warlike manner, then and there in a certain public street and highway there situate, unlawfully, and to the great terror and disturbance of divers liege subjects of our said lady the Queen, then and there being, did make an affray; in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.
*Fine or imprisonment, or both.*

#### *Evidence.*

Prove that the defendants fought in a public street or highway; for if it be in private, it is an assault and battery merely, and not an affray. 1 *Hawk. c.* 63, *s.* 1. Also, no quarrelsome or threatening words whatever will amount to an affray. *Id. s.* 3.

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## Sect. 3.

### FORCIBLE ENTRY OR DETAINER.

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#### *Statutes.*

5 *Ric.* 2, *st.* 1, *c.* 8.]—And also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will.

21 *Jac.* 1, *c.* 15]—Enacts, that such judges, justices or justice of the peace, as by reason of any act or acts of parliament now in force are authorized and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present act have the like and the same authority and ability from henceforth, (upon indictment of such forcible entries, or forcible withholdings before them duly found),

to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knights' service, tenants by *elegit*, statute-merchant, and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force.

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*Indictment for a forcible Entry into a Freehold, on Stat. 5 R. 2, c. 8.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that one J. N., late of the parish of B, in the county of M., on the third of August, in the fourth year of the reign of our sovereign lady Victoria, in the parish aforesaid, in the county aforesaid, was seised in his demesne as of fee of and in a certain messuage, with the appurtenances there situate and being; and the said J. N., being so seised thereof as aforesaid, J. S., late of the parish aforesaid in the county aforesaid, labourer, afterwards, to wit, on the day and year last aforesaid, in the parish aforesaid, in the county aforesaid, into the said messuage and appurtenances aforesaid, with force and arms, and with strong hand, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there with force of arms, and with strong hand, unlawfully did expel and put out; and the said J. N. from the possession thereof so as aforesaid, with force and arms, and with strong hand, being unlawfully expelled and put out, the said J. S from the aforesaid third day of August, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously then and there did keep out, and still doth keep out; to the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *See the precedents,* 4 *Went.* 149; 6 *Went.* 403, 428. *The premises must be described with the same certainty as in a declaration in ejectment, on account of the restitution which follows conviction. If the estate J. N. had in the premises were not a fee simple, but an estate in tail, or for life merely, describe it as such. See Reg.* v. *Bowser,* 8 *Dowl. P. C.* 128.

*Imprisonment, and ransom at the King's will.* 5 *R.* 2, *c.* 8.

*Evidence.*

The prosecutor must prove:—*First,* that he was seised in fee of the premises in question, at the time of the forcible entry; and proof that he was in the actual occupation of the premises, or in the perception of the rents and profits, is sufficient *primâ facie* evidence of his seisin. *See Jayne* v. *Price,* 5 *Taunt.* 326; 1. *Marsh.* 68. This presumption, however, may be rebutted, either by direct evidence of his having a less estate, or by evidence of circumstances from which the jury may presume it. *Ib.* But it is immaterial whether the estate thus proved be an estate by right or by wrong; for, even if the defendant have a right of entry, still his asserting that right "with strong hand or with multitude of people," is equally an offence within the statute as if he had no right. The statute, however, does not

extend to a case where the party ousted had the bare custody of the premises for the defendant; 1 *Hawk. c.* 64 *s.* 32; but it extends to the forcible ouster of one joint tenant, or tenant in common, by another. *Id. s.* 33. It may be considered a good general rule, also, that the statute extends to all hereditaments, to which the defendant, if he had a right, might have asserted that right by a peaceable entry.

*Secondly*, the prosecutor must prove the forcible entry. An entry "with strong hand," or "with multitude of people," is the offence described in the statute. Therefore, an entry by breaking the doors or windows, &c., whether any person be in the house or not, especially if it be a dwelling-house, is a forcible entry within the statute. *See* 1 *Hawk. c.* 64, *s.* 26. So, an entry where personal violence is done to the prosecutor, or to any of his family or servants, or to any person or persons keeping the possession for him, *Id. s.* 26, or even where it is accompanied with such threats of personal violence, (either actual, or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like), as were likely to intimidate the prosecutor or his family, &c., and to deter them from defending their possession; *Id. ss.* 27, 20, 21; *Milner* v. *Maclean*, 2 *C. & P.* 17, is a forcibly entry within the statute. But an entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out and then shutting the door upon him, or the like, without further violence, *Com. Dig., Forc. Ent.* (*A.* 3); 1 *Hawk. c.* 64, *s.* 26, or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence, 1 *Hawk. c.* 64, *s.* 28, is not deemed a forcible entry. A mere trespass will not support an indictment for a forcible entry; there must be such force, or show of force, as is calculated to prevent resistance, *R.* v. *Smyth*, 5 *C. & P.* 201. If, however, whilst the owner is out of his house, the defendant forcibly withhold him from returning to it, and in the meantime send persons to take possession of it peaceably, this is said to be a forcible entry. 1 *Hawk. c.* 64, *s.* 26. Also, where a party having right, and whose entry is congeable, enters or makes claim, and the other party afterwards continues to hold possession by force; this is considered a forcible *entry* in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry. *Id. s.* 22, 34; *Co. Lit.* 251.

Where the party entering has in fact no right of entry, all persons in his company, as well those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who use or threaten violence, 3 *Bac. Abr., Forc. Ent.* (B.), or who actually abet those who do, are guilty. A wife may be guilty of a forcible entry into the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry in itself is lawful. *R.* v. *Smyth*, 1 *M. & Rob.* 156; 5 *C. & P.* 201.

*Thirdly*, as to the expulsion; it is necessary to prove the expulsion, and that the prosecutor is still kept out of possession, merely for the purpose of obtaining restitution of the premises; 1 *Hawk. c.* 64, *s.* 41; but it is no part of the offence described by the statute which mentions a forcible entry merely. And it may be necessary here to observe, that no restitution shall be awarded, if the defendant have been permitted to remain quietly in possession for three years, previously to the finding of the indictment. 31 *El. c.* 11.

In all cases which admit of restitution, the prosecutor has a direct interest in the verdict, and therefore was not, until the stat. 6 & 7 *Vict. c.* 85, a competent witness. *R.* v. *Beavan, Ry. & M. N.P.* 242: *R.* v. *Williams*, 4 *Man. & R.* 471; 9 *B. & C.* 549.

A judge at the assizes may, in his discretion, refuse to award restitution, after an indictment for forcible entry and detainer has been found by a grand jury; and the court of Queen's Bench will not review his decision. *Reg.* v. *Harland*, 2 *M. & Rob.* 141: *S. C.*, 8 *Ad. & Ell.* 826; 1 *Per. & D.* 93. As to the form of a writ of restitution, *see Dalt. c.* 182.

### *Indictment for a Forcible Entry into a Leasehold, &c., on Stat.* 21 *J.* 1, *c.* 15.

*This may be the same as the last precedent, with such alterations only as are necessary to adapt it to a term for years, tenancy by copy of court roll, or tenancy by elegit, statute-merchant, and staple, as thus*]:—that J. N., late of &c. &c., was possessed of a certain messuage with the appurtenances, there situate and being, for a certain term of years, whereof divers, to wit, ten years, were then to come, and are still unexpired: and the said J. N. being so possessed thereof, *&c. &c. as in the last precedent. The evidence is the same as in the last case, except merely in the proof of the estate the prosecutor had in the premises.*

### *Indictment for a Forcible Detainer, on Stat.* 8 *H.* 6, *c.* 9, *or* 21 *J.* 1, *c.* 15.

*The same as in the last two precedents respectively, to the end of the statement of the seisin or possession; then proceed thus*]:—*and* the said J. N. being so seised [*or* possessed] thereof, J. S., late of the parish aforesaid, in the county aforesaid, labourer, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, into the said messuage, with the appurtenances aforesaid, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there unlawfully did expel and put out; and the said J. N. from the possession thereof so as aforesaid being unlawfully expelled and put out, the said J. S., from the said third day of August, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand unlawfully and injuriously then and there did keep out, and the said messuage with the appurtenances and the possession thereof then and there unlawfully and forcibly did hold, and still doth hold, from the said J. N.; to the great damage of the said J. N., against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

#### *Evidence.*

Prove the seisin or possession, as in the two former cases. Prove an entry; whether peaceable or not is immaterial. Proof of the ex-

pulsion, which *ex vi termini* implies force, is not material, as the gist of the offence is the forcible detainer merely. Holding the premises from the prosecutor by force, however, must be proved: and the same violence or terror which will make an entry forcible, will also make a detainer forcible. 1 *Hawk. c.* 64, *s.* 30; 1 *Russ.* 311. But merely refusing to go out of the house; 1 *Hawk. c.* 64, *s.* 30; or a tenant at will denying possession to his lessor; or a man keeping out of his land, by force, a person claiming common upon it; *Com. Dig., Forc. Det.* (B. 2); is not a forcible holding within the meaning of the statutes. *See R.* v. *Oakley*, 4 *B. & Ad.* 307: *R.* v. *Wilson*, 3 *Ad. & Ell.* 817.

### *Indictment for a Forcible Entry and Detainer at Common Law.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., gentleman, K. T., of the same parish, carpenter, and L. W., of the same parish, labourer, together with divers other persons, to the number of six or more, to the jurors aforesaid unknown, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons, at the parish aforesaid, in the county aforesaid, into a certain barn and a certain orchard there situate and being, and then and there in the possession of one J. N., unlawfully, violently, forcibly, injuriously, and with a strong hand, did enter; and the said J. S., K. T., and L. W., together with the said other evil-disposed persons, to the jurors aforesaid unknown, as aforesaid, then and there, with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons, unlawfully, violently, forcibly, injuriously, and with a strong hand, the said J. N. from the possession of the said barn and orchard did expel, amove, and put out; and the said J. N. so as aforesaid expelled, amoved, and put out from the possession of the said barn and orchard, then and there with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons, unlawfully, violently, forcibly, injuriously, and with strong hand, did keep out, and still do keep out, and other wrongs to the said J. N. then and there did: to the great damage of the said J. N., and against the peace of our lady the Queen, her crown and dignity. *There is no doubt an indictment will lie at common law for a forcible entry; although it is generally brought on the acts of Parliament. Per Wilmot, J., in R.* v. *Bake*, 3 *Burr.* 1731.

*This is a misdemeanor at common law.*

### *Evidence.*

The evidence of the forcible entry, upon this indictment, must be stronger than is required to support an indictment on the statutes; that is to say, there must be proof of such a force as constitutes a public breach of the peace. *R.* v. *Wilson*, 8 *T. R.* 357. *And see R.* v. *Bake*, 3 *Burr.* 1731.

It is not necessary to set forth or prove the particulars of the prosecutor's estate in the messuage, &c., because in this case there is no restitution: stating that J. N. was possessed, and proving his possession, will be sufficient. *R.* v. *Wilson*, 8 *T. R.* 357. For the same

reason, it does not seem to be necessary to prove the expulsion or detainer, unless where the prosecutor has failed to prove the entry to have been forcible. (*See ante, p.* 601).



## Sect. 4.

### CHALLENGE TO FIGHT.



*Indictment for sending a Challenge.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., gentleman, being a person of a turbulent and quarrelsome temper and disposition, and contriving and intending not only to vex, injure, and disquiet one J. N., and do the said J. N. some grievous bodily harm, but also to provoke, instigate, and excite the said J. N. to break the peace, and to fight a duel with and against him the said J. S., on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid,* wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered, unto him the said J. N. a certain letter and paper writing, containing a challenge to fight a duel with and against him the said J. S., and which said letter and paper writing is as follows, that is to say, [*here set out the letter, with such innuendos as may be necessary*]: to the great damage, scandal, and disgrace of the said J. N., in contempt of our lady the Queen and her laws, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, wickedly, wilfully, and maliciously did provoke, instigate, excite, and challenge the said J. N. to fight a duel with and against him the said J. S.; to the great damage, scandal, and disgrace of the said J. N., in contempt of our lady the Queen and her laws, and against the peace of our lady the Queen, her crown and dignity.

*Fine or imprisonment, or both.* (*See the precedents, Cro. Circ. Com.* 102—104; 4 *Went.* 315; 6 *Went.* 385—461; *and see R.* v. *Phillips*, 6 *East*, 464). *From the above precedent an indictment may be readily framed against the person who delivered the challenge.*

*Evidence.*

Give the letter in evidence, and prove the handwriting. Prove also the delivery of it to J. N. Where the letter containing the challenge was put into the post-office in the county of Middlesex, to be delivered to the prosecutor in another county, Lord *Ellenborough* held, that the party might be indicted in Middlesex: for *sending* the challenge is the offence; whether it reach the person to whom it is sent or not is immaterial. *R.* v. *Williams*, 2 *Camp.* 506.

Provocation, however great, is no excuse or justification on the

part of the defendant, *R.* v. *Rice*, 3 *East*, 581, however it may weigh with the court in apportioning the punishment.

### *Indictment for provoking a Man to send a Challenge.*

*Proceed as in the last precedent* to the *, *and then thus*]—wickedly, wilfully, and maliciously, did utter, pronounce, declare, and say to, and in the presence and hearing of, the said J. N., these words following, that is to say:—"You are a scoundrel and a liar, and I shall take care to let the world know that you are so;" with intent to instigate, excite, and provoke the said J. N. to challenge him the said J. S. to fight a duel with and against him the said J. N.; to the great damage, *&c., as in the last precedent. If there be any doubt as to the words, lay them differently in different counts; and add a general count, not setting out the words, but merely charging the defendant with having used threats and opprobrious language to the prosecutor, with intent, &c.*

*Fine or imprisonment, or both. See R.* v. *Phillips*, 6 *East*, 464.

### *Evidence.*

Prove the words. (*See ante, p.* 102). And give evidence of circumstances from which the jury may infer the defendant's intent, if such intent do not sufficiently appear from the words proved. *See R.* v. *Phillips*, 6 *East*, 470; (*ante, p.* 122).

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## Sect. 5.

### THREATENING LETTER.

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### *Statute.*

7 *&* 8 *G.* 4, *c.* 29, *s.* 8]—Enacts, that if any person shall knowingly send or deliver any letter or writing demanding of any person, with menaces, and without any reasonable or probable cause any chattel, money, or valuable security; or if any person shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse, any person of any crime punishable by law with death, transportation, or pillory, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, as hereinafter defined (*sect.* 9), with a view or intent to extort or gain from such person any chattel, money, or valuable security; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

Sect. 9.—*Definition of an infamous Crime.*]—And for defining what shall be an infamous crime within the meaning of this act, be it enacted, that the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt to endeavour to

commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act.

*Indictment for sending or delivering a Letter demanding Money, &c.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, knowingly and feloniously did send ("*send or deliver*") to one J. N. a certain letter, ("*any letter or writing*"), directed to the said J. N., by the name and description of Mr. J. N*. demanding money ("*money, chattel, or valuable security*") from the said J. N., with menaces, and without any reasonable or probable cause; and which said letter is as follows; that is to say, [*here set out the letter verbatim*]: against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity. *The letter must be set out in the indictment,* (*see R.* v. *Lloyd,* 2 *East, P. C.* 1123), *and care must be taken to set it out correctly, for a variance would be fatal.* (*See ante, p.* 102).

*Felony, transportation for life, or not less than seven years, or imprisonment, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 4, (*ante, p.* 169), *such confinement not exceeding one month at any one time, nor six months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169) ), *not exceeding four years; and, if a male, to be one, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 8.

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Give the letter in evidence, and prove it to have been sent or delivered by the defendant, as charged in the indictment.

*Knowingly and feloniously did send.*]—Prove that the defendant dropped the letter in a place where he knew the prosecutor would come, and that it was picked up by another person, and by him delivered to the prosecutor; *R.* v. *Lloyd,* 2 *East, P. C.* 1123; *R.* v. *Wagstaff, R. & R.* 398; or that the letter is of the handwriting of the defendant, and that it came to the prosecutor by the post; *R.* v. *Heming,* 2 *East, P. C.* 1116; *and see R.* v. *Jepson, Id.* 1115; has been holden sufficient evidence of a sending by the defendant. So, where the prosecutor, having received such a letter, traced it to a woman who was in the habit of going of errands for the prisoners in Newgate, and she proved that she received it from the defendant, then a prisoner in Newgate, to put in the post-office, and the servant of the post-office proved that the letter in question was brought to the office by the last witness, and forwarded in the regular course; this was holden sufficient evidence, not only of the sending by the defendant, but that he also knew its contents. *R.* v. *Girdwood,* 2 *East, P. C.* 1120; 1 *Leach,* 142. And sending the letter to A. in order that he may deliver it to B., is a sending to B., if the letter is delivered by

A. to B. *R.* v. *Paddle, R. & R.* 484. So, the leaving a letter directed to A., near A.'s house, with an intention that it should not only reach A., but B. also, was held to be a sending of it to B., by whom it was afterwards seen. *Reg.* v. *Grimwade*, 1 *C. & K.* 592. Where the only evidence of sending a threatening letter was the declaration of the defendant, that he should never have written it but for W. G., it was holden insufficient. *R.* v. *Howe*, 7 *C. & P.* 268. A delivery of a letter was not within the former statutes on this subject; *R.* v. *Hammond*, 2 *East, P. C.* 1119; 2 *Leach*, 499; but a delivery of it, with a knowledge of its contents, is within the express terms of the present act.

*A certain Letter, &c.*]—The words in this statute are "any letter or writing," and therefore the decisions upon the former statutes on this subject are inapplicable to the present.

A material variance between the letter set out and that produced in evidence will be fatal. (*See ante, p.* 102).

In *R.* v. *Haine*, 6 *C. & P.* 105, *Bolland*, B., ordered the letter to be deposited in the hands of the clerk of the peace, in order that the defendant's witnesses might inspect it before the trial.

*Demanding Money.*]—"Any chattel, money, or valuable security." *See* 7 & 8 *G.* 4, *c.* 29, *s.* 5, (*ante, p.* 213). If there be any doubt which of two or three things be demanded, it may be stated differently in different counts. Where the letter contained a request only, but intimated that, if it were not complied with, the writer would publish a certain libel then in his possession, accusing the prosecutor of murder: this was holden to amount to a demand. *R.* v. *Robinson*, 2 *Leach*, 749; 2 *East, P. C.* 1110. A mere request, however, such as asking charity or the like, without imposing any conditions, would not come within the meaning of the word "demand" in the statute. *Per Buller*, J., in *R.* v. *Robinson, supra.* The demand must be with menaces, and without any reasonable or probable cause, and it will be for the jury to consider whether the letter does expressly or impliedly contain a demand of this description. The words "without any reasonable or probable cause" apply to the demand of money, and not to the accusation threatened by the defendant to be made against the prosecutor; and it is therefore immaterial whether that accusation be true or not. *Reg.* v. *Hamilton*, 1 *C. & K.* 212: *see R.* v. *Gardner*, 1 *C. & P.* 479, (*ante, p.* 261).

Where an anonymous letter stated that the writer had overheard certain persons agree together to do an injury to the person or property of the prosecutor, to whom the letter was sent, and that if thirty sovereigns were laid in a particular place, the writer would give such information as would frustrate the attempt; this was holden not to be a threatening letter within the statute 7 & 8 *G.* 4, *c.* 29, *s.* 8.; although it appeared that the letter was a mere device to defraud the prosecutor of thirty sovereigns. *R.* v. *Pickford*, 4 *C. & P.* 227.

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### *Indictment for threatening to Accuse a Man of a Crime, with Intent, &c.*

*Commencement as in the last precedent*]—in the county afore-

said, feloniously did threaten one J. N. to accuse ("*accuse, or threaten to accuse*") him the said J. N., of having attempted and endeavoured to commit the abominable crime of sodomy with the said J. S., ("*any crime punishable by law with death, transportation, or pillory, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime*"), with a view and intent thereby then and there to extort and gain money ("*chattel, money, or valuable security*") from the said J. N.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It is not necessary to describe the accusation in strict technical language; see R. v. Tucker, 1 Mood. C. C. 134. The indictment must allege that the defendant threatened to accuse the prosecutor. See R. v. Dunkley, 1 Mood. C. C. 90, (ante, p. 264.)*

*Felony. 7 & 8 G. 4, c. 29, s. 8. See the last precedent.*

*Evidence.*

Prove the threat or accusation, and the intent.

The indictment must state that the defendant threatened J. N., and it must be proved that the threat was made use of to him, *R.* v. *Dunkley*, 1 *Mood. C. C.* 90. It would seem, however, that if the threat were made to a third person, with the intent that he should communicate it to J. N., it would support this allegation. *R.* v. *Paddle, R. & R.* 484. It must be a threat to accuse, or an accusation: if J. N. be indicted, or in custody for an offence, and the defendant threaten to procure witnesses to prove the charge, it will not be a threat to accuse within the meaning of the statute. *R.* v. *Gill*, 1 *Arch. P. A.* 302. Where it was doubtful from the letter what charge was intended, parol evidence was admitted to explain it, and the prosecutor proved, that, having asked the prisoner what he meant by certain expressions in the letter, the prisoner said that he meant that the prosecutor had taken indecent liberties with his person: the judges held the conviction to be right. *R.* v. *Tucker*, 1 *Mood. C. C.* 134.

The intent must be proved as laid; a variance will be fatal. Where the intent laid was to extort money, and the intent proved was to extort a bill of exchange, it was holden a fatal variance. *R.* v. *Major*, 2 *East, P. C.* 1118. If the intent do not appear sufficiently from the accusation or threat itself, it must be proved by circumstances from which the jury may fairly presume it. (*See ante, p.* 104).

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*Indictment for sending a Letter, threatening to Accuse, with Intent, &c.*

*Commencement as ante, p.* 606, *to the asterisk*]—threatening to accuse him the said J. N., ("*accusing or threatening to accuse*"), of having, [*&c., as in the last precedent to the words*] from the said J. N., and which said letter is as follows, that is to say, [*here set out the letter verbatim*]: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *An indictment for sending a letter threatening to accuse a man of an infamous crime, need not specify such crime, for the specific crime the defendant threatened to charge might intentionally be*

*left in doubt. R.* v. *Tucker,* 1 *Mood. C. C.* 134. *Care must be taken to set out the letter correctly.*

*Felony. See the last precedent but one.* 7 *&* 8 *G.* 4, *c.* 29, *s.* 8.

*Evidence.*

Prove that the defendant sent or delivered the letter, as directed *ante, p.* 606. Whether the letter amounted to a threat to accuse the prosecutor of the offence mentioned, is a fact to be determined by the jury. *See R.* v. *Girdwood,* 2 *East, P. C.* 1121; 1 *Leach,* 142. If it does not appear from the letter itself of what offence the defendant threatened to accuse the prosecutor, the defendant's declaration of the meaning of the letter may be given in evidence to explain it. *R.* v. *Tucker,* 1 *Mood. C. C.* 134.

The intent must also be proved, as in the last case; and in order to prove the intent, other letters received by the prosecutor from the defendant upon the same subject may be given in evidence.

SENDING A LETTER THREATENING TO KILL OR BURN, &c.

*Statute.*

4 *G.* 4, *c.* 54, *s.* 3—*Letter threatening to burn*]—Enacts, that from and after the passing of this act, if any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature, . . . . . . . . . threatening to kill or murder any of his Majesty's subjects, or to burn or destroy his or their houses, out-houses, barns, stacks of corn or grain, hay, or straw, . . . . . . or shall procure, counsel, aid, or abet the commission of the said offence, . . . . . . . every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for such term, not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding seven years. [*Repealed by* 7 *&* 8 *G.* 4. *c.* 27, *s.* 1, *except so for as relates to the offence above mentioned.*]

*Indictment.*

*Commencement as ante, p.* 606]—in the county aforesaid, knowingly, wilfully, and feloniously, did send ("*send or deliver*") to one J. N. a certain letter, ("*letter or writing*") without any name or signature [*or,* "with a certain fictitious name" *or,* "signature," "to wit, the name," *or* "signature" "of P. L.," *or,* "with the name" *or* "signature" "of ——"] thereto subscribed, directed to the said J. N., by the name and description of Mr. J. N., threatening to kill and murder the said J. N., a subject of our lady the Queen then and there being, [*or,* "threatening to burn and destroy the houses, out-houses, barns, stacks of corn and grain, hay and straw, (*or any of them*), the property of the said J. N., a subject of our lady the Queen

then and there being"] which said letter is as follows, that is to say, [*here set out the letter verbatim*]: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony, transportation for life, or not less than seven years, or imprisonment with or without hard labour, not exceeding seven years.* 4 *G.* 4, *c.* 54, *s.* 3.

*This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant sent or delivered the letter to J. N., as directed *ante, p.* 606.

The words in the former acts were, "a letter without a name, or with a fictitious name," but the words in this statute are, "any letter or writing, with or without a name or signature subscribed thereto, or with a fictitious name or signature." Upon the old acts, it was holden, that a letter signed with initials merely, was a letter without a name within the meaning of them. *R.* v. *Robinson*, 2 *East, P. C.* 1110; 2 *Leach*, 749. It would also seem to be a letter with a signature within the meaning of the present act. A letter signed with the real name of the writer would not have been within the former acts. Even where a letter without a name was written in an undisguised hand, to a person who well knew the writer's handwriting, and it related to matters then in dispute between them, as it appeared evident from circumstances, that the defendant, although he did not actually sign the letter, had no intention to conceal himself, the judge held that the letter was not within the statute. *R.* v. *Heming*, 2 *East, P. C.* 1116. But a letter with a real name or signature would, as it seems, come within the meaning of the present act. Sending a letter to A. B., threatening to burn a house of which he was owner, but let by him to and occupied by a tenant, was held not to be an offence within the statute. *Reg.* v. *Burridge*, 2 *M. & Rob.* 296: *sed quære*; *see Reg.* v. *Grimwade*, 1 *C. & K.* 592.

A material variance between the letter set out and that produced in evidence will be fatal. (*See ante, p.* 102).

Where the threat is to kill or murder, it is for the jury to say whether the latter amounts to a threat to kill or murder. *R.* v. *Girdwood*, 2 *East, P. C.* 1121; 1 *Leach*, 142: *R.* v. *Boucher*, 4 *C. & P.* 563: *R.* v. *Tyler*, 1 *Mood. C. C.* 428.

Upon an indictment on the repealed stat. 9 *G.* 1, *c.* 22, the words of which were, "to burn the dwelling-house, out-houses," &c., where the writer of the letter threatened to *burn* the prosecutor's mill and to do *all the injury he was able* to his farms, and the prosecutor proved that he had no mill at the time, but that he had farms, and buildings upon them: the judges held clearly, that, as to the mill, the letter was not within the statute; and the majority of the judges held, that, even as to the farms, as the letter did not necessarily imply that the injury to them was to be effected by fire, it was not within the act. *R.* v. *Jepson*, 2 *East, P. C.* 1115. Neither would this threat as to the farms satisfy the term "destroy" in this statute.

## SECT. 6.

### LIBEL.

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*Statute.*

6 & 7 *Vict. c.* 96, *s.* 3.—*Publication or Suppression of Libel with Intent to extort Money, &c.*]—Enacts, that if any person shall publish or threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly offer to prevent the printing or publishing, of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: Provided always, that nothing herein contained shall in any manner alter or affect the law now in force in respect of the sending or delivering of threatening letters or writings.

Sect. 4—*Punishment for false defamatory Libel*]—Enacts, that if any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction, for any term not exceeding two years, and to pay such fine as the court shall award.

Sect. 5—*Punishment for defamatory Libel*]—Enacts, that if any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine and imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

Sect. 6—*Proceedings on Trial of Indictment or Information*]—Enacts, that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged, in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the

defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matter charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea or justification: Provided also, that in addition to such plea it shall be competent to the defendant also to plead a plea of not guilty: Provided also, that nothing in this act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.

Sect. 7—*Evidence to rebut primâ facie case of Publication by Agent*]—Enacts, that whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

Sect. 8—*Costs*]—Enacts, that in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea; such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried.

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### *Indictment for a false defamatory Libel.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., schoolmaster, contriving, and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice one J. N., and to deprive him of his good name, fame, credit, and reputation, and to bring him into great contempt, scandal, infamy, and disgrace, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, wickedly, and maliciously did write and publish, and cause and procure to be written and published, a false, scandalous, malicious, and defamatory libel, in the form of a letter directed to the said J. N., [*or, if the publication were in any other manner, omit the words,* "in the form," &c.], containing divers false,

scandalous, malicious, and defamatory matters and things of and concerning the said J. N., and of and concerning [*&c., here insert such of the subjects of the libel as it may be necessary to refer to by the innuendos, in setting out the libel; (see ante, p.* 525)], according to the tenor and effect following, that is to say, [*here set out the libel, together with such innuendos as may be necessary to render it intelligible; (see ante, p.* 525)], he the said J. S. then and there well knowing the said defamatory libel to be false; to the great damage, scandal, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

• *Imprisonment not exceeding two years, and fine.* 6 *&* 7 *Vict. c.* 96, *s.* 4. *If the prosecutor fail to prove the scienter, the defendant may nevertheless be convicted of publishing a defamatory libel, and punished by fine, or imprisonment not exceeding one year, or both. Id. s.* 5. *The defendant may plead, in addition to the plea of not guilty, that the matters charged were true, and that it was for the public benefit that they should be published, setting forth the particular facts by reason of which the publication was for the public benefit; and if, after such plea the defendant be convicted, the court may take the plea and evidence in support of it into consideration, in aggravation, or in mitigation. Id. s.* 6. *In the case of an indictment or information for libel by a private prosecutor, the defendant is entitled to costs, if judgment be given for him; and if the issue on a special plea of justification be proved for the prosecutor, he is entitled to the costs sustained by him by reason of such plea. Id. s.* 7. *As to the proof of libels published in newspapers, see* 38 *G.* 3. *c.* 78, *ss.* 9, 10, 11, 14, 17, (*ante, p.* 520).

*The offence of libel is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

Before we consider the evidence in this case, it may not be unnecessary to notice, shortly, the law relative to libels against private individuals; we have already noticed seditious libels, (*ante, p.* 523), blasphemous libels, (*ante, p.* 532), and libels reflecting on the administration of justice, (*ante, p.* 587).

A libel, in the sense under which we are now to consider it, is a malicious defamation of any person, made public either by printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule.

In considering what writings are libellous, it may be necessary to premise, that, wherever an action will lie for a libel, without laying special damage, an indictment will also lie. Also, wherever an action will lie for verbal slander, without laying special damage, an indictment will lie for the same words, if reduced to writing and published. But the converse of this latter proposition will not hold good; for an action or indictment may be maintained for words written, for which an action could not be maintained if they were merely spoken. *Thorley* v. *Lord Kelly*, 4 *Taunt.* 355. As, for instance, if a man write or print, and publish, of another, that he is a scoundrel, *J'Anson* v. *Stuart*, 1 *T. R.* 748, or villain, *Bell* v. *Stone*, 1 *B. & P.* 331, it is a libel, and punishable as such; although, if this were merely spoken, it would not be actionable without special damage. 2 *H. Bl.* 531. But no indictment will lie for mere words, not reduced into writing. 2 *Salk.* 417: *R.* v. *Langley*, 6 *Mod.* 125, unless they be seditious, (*see ante, p.* 524), blasphemous, (*ante, p.*

533), grossly immoral, or uttered to a magistrate in the execution of his office, (*ante, p.* 588), or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge. (*Ante, p.* 605).

1. An action will lie (without laying special damage) for all words spoken of another, which impute to him the commission of a crime punishable by law, such as high treason, murder, or other felony, (whether by statute or at common law), forgery, perjury, subornation of perjury, or other misdemeanor; or even an offence punishable merely by the custom of some particular place, if the words be uttered there. *Com. Dig., Action on the Case for Defamation,* (*D.* 1—10), (*F.* 1—7, 12—18). *And see* 3 *Wils.* 186; 2 *W. Bl.* 750, 959; *Cowp.* 275; 2 *Wils.* 300; 6 *T. R.* 694; 9 *East,* 93; 5 *Id.* 463; 2 *N. R.* 335; 4 *Price,* 46; 7 *Taunt.* 431. But words imputing to a man an act, which (however immoral) is not punishable criminally by law, cannot be made the subject of an action, without laying special damage. *See Com. Dig. ubi supra,* (F. 20); 3 *Wils.* 187; 2 *W. Bl.* 750; 5 *Bur.* 2698; 6 *T. R.* 691; 2 *Ad. & Ell.* 1; 5 *M. & W.* 249.

2. An action will lie (without laying special damage) for all words spoken of another, which may have the effect of excluding him from society: as, for instance, to charge him with having an infectious disease, such as leprosy, the venereal disease, the itch, or the like. *Com. Dig., Action on the case for Defamation* (D. 28, 29). (*F.* 11, 19), 2 *Bur.* 930. But charging him with *having had* a contagious disease is not actionable; for, as this relates to a time past, it is no reason why his society should be avoided at present. 2 *T. R.* 473.

3. An action will lie (without laying special damage) for writing and publishing anything of a man which renders him ridiculous, 2 *Wils.* 403; 1 *W. Bl.* 294, or contemptible. *Lord Churchill* v. *Hunt,* 2 *B. & Ald.* 685; 4 *Taunt.* 355; *Macgregor* v. *Thwaites,* 4 *D. & R.* 695; 3 *B. & C.* 24: *Parmiter* v. *Coupland,* 6 *M. & W.* 105;

4. An action will lie (without laying special damage) for words of a man, which may impair or hurt his trade or livelihood; as, for instance to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or the like. *Finch, L.* 186. *See the several cases in Com. Dig. ubi supra;* (D. 22—27), (*F.* 9, 10); *Fitzg.* 121; 2 *W. Bl.* 750; 3 *Wils.* 187, 59; 2 *Str.* 898; 2 *Stark. N. P. Rep.* 245, 297; 4 *Esp.* 191; 3 *B. & P.* 372; 3 *Bing.* 184; 5 *B. & C.* 150; 1 *C. & J.* 143; 2 *Ad. & E.* 2; 5 *M. & W.* 249.

5. Writings vilifying the characters of persons deceased are libels, and may be made the subject of an indictment; 5 *Co.* 125 *a*; but the indictment in such a case must charge the libel to have been published with a design to bring contempt on the family of the deceased, or to stir up the hatred of the Queen's subjects against them, or to excite them to a breach of the peace, *R.* v. *Topham,* 4 *T. R.* 127, otherwise it cannot be maintained.

6. Writings which tend to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be proceeded upon here as libels, and the writers, publishers, &c. punished; particularly when such writings have a tendency to interrupt the pacific relations between the two countries. *Per Lord Ellenborough, in R.* v. *Peltier, Holt on Libel,* 78, *&c.* In the case just

cited, an information was filed against Peltier for a libel on Napoleon Buonaparte, then first consul of the French republic; and the defendant was convicted. *See also R.* v. *D'Eon*, 1 *W. Bl.* 517.

7. And not only are libels upon individuals punishable by indictment, but writings also reflecting upon bodies of men, without mentioning any one in particular, are likewise punishable as libels, if they tend to stir up the hatred of the Queen's subjects against the members of the body generally, or to excite the individuals composing the body to a breach of the peace. *R.* v. *Osborne*, 2 *Barnardiston*, 138, 166.

Having now treated of the matter of a libel, it remains to say a few words upon the manner or form in which it is expressed. It is immaterial whether the libel impute crime, &c., to the prosecutor, in a direct manner, or indirectly, by such hints or modes of expression as are likely to convey the intended meaning to the person to whom the libel was published; taking the words in the same sense in which the rest of mankind would ordinarily understand them, it is for the jury to say whether, in their minds, they convey the idea imputed. 2 *T. R.* 206, *per Buller*, J. Therefore, where one man said of another that "his character was infamous; that delicacy forbade him from bringing a direct charge, but it was a male child who complained to him," such words were understood to mean a charge of unnatural practice and to be sufficiently certain in themselves, without the aid of an innuendo. *Woolnoth* v. *Meadows*, 5 *East*, 463. So, if a man were to write or say of J. N., "There is a vast difference between my character and his; I never robbed my master," or the like: it would be the same as if he had directly charged J. N. with having robbed his master. *See* 2 *Lev.* 150; 1 *Vent.* 276; *Com. Dig.*, *Action on the case for Defamation*, (E. 8). And the same where the imputation is conveyed obliquely, *Id.* (E. 1), or indirectly, *Id.* (E. 7), or by way of question, *Id.* (E. 2), conjecture, *Id.* (E. 3), or exclamation, *Id.* (E. 6), or by irony, 1 *Hawk. c.* 73, *s.* 4, or the like. So, a defamatory writing, expressing one or two letters only of a name, is as much a libel, and punishable as such, as if it expressed the name in full, if it appear evident upon the face of the libel, from the context, &c., what name was meant, 1 *Hawk. c.* 73, *s.* 5, or if it appear from the evidence of persons acquainted with the parties, what person was meant by such initials or letters.

*As to the form of the indictment for libel generally, see ante, p.* 523 *et seq.*

## *Evidence.*

Prove the offence in the same manner as directed *ante, p.* 524. If the libel reflect on the character of a public officer or professional man, as such, it is not in general necessary to prove his appointment to the office, or admission to the profession, because that is almost in all cases either directly or impliedly admitted by the libel itself; *see* 4 *T.R.* 366; 1 *N. R.* 196, 208: *Jones* v. *Stevens*, 11 *Price*, 235: *Pearce* v. *Whale*, 5 *B. & C.* 38; and if it be not proof that he was in the habit of acting as such officer or professional man, would in that case be sufficient; but if the effect of the libel be to charge the prosecutor with having acted as such officer or professional man, without a legal appointment, as for instance, if a man libel a physician by calling him a quack, it seems necessary to prove the appointment or admission.

*See Smith* v. *Taylor*, 1 *N. R.* 196; 3 *Bing.* 432; 11 *Moore*, 308; 4 *M. & Sel.* 548; 1 *Ad. & E.* 695.

In addition to what has already been mentioned, as to evidence on the part of the defendant, in the case of a libel, (*ante, p.* 538), the defendant, in the case of a libel against an individual, may prove that the alleged publication of the matter complained of as libellous, was merely a communication in confidence, and without malice; as, where a master gives a correct character of a servant; *Bull. N. P.* 8; 4 *Burr.* 2425; 1 *T. R.* 110; 3 *Bos. & P.* 587; where a neighbour gives what he conceives to be a correct character of the credit and solvency of a tradesman; *Bull. N. P.* 8; or where a client makes confidential representations injurious to an attorney's professional character in the management of certain concerns, to other persons who are jointly interested in them with the client, 1 *Camp.* 227, or the like. Also, if a writing, although injurious to another's character, be published, not maliciously or with intent to injure his character, but *bonâ fide* for the purpose of investigating a fact in which the party making it is interested, it is not libellous. *See Delany* v. *Jones*, 4 *Esp.* 191: *Brown* v. *Croom*, 2 *Stark. N. P. C.* 297: *R.* v. *Bayley*, *Andr.* 229: *Fairman* v. *Ives*, 1 *D. & R.* 252; 5 *B. & Ald.* 642.

The defendant may allege and prove the truth of the libel, in the manner and subject to the conditions mentioned in the 6 & 7 *Vict. c.* 96, *s.* 6; (*ante, p.* 611. *See also ante, p.* 529).

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*Indictment for a Libel on an Attorney.*

Middlesex, to wit: The jurors for our lady the Queen upon their oath present, that J. N., gentleman, at the time of publishing the false, scandalous, malicious, and defamatory libel hereinafter mentioned, was, and long before, and from thence hitherto hath been, and still is, one of the attornies of the court of our lady the Queen before the Queen herself, and in the office, practice, and business of an attorney hath been, during all that time, retained and employed by divers subjects of this realm, to prosecute and defend for them, as their attorney, agent, and solicitor, divers suits and businesses in the said court, and in other her Majesty's courts at Westminster and elsewhere, and also to do and negotiate other affairs and business as such attorney, to wit, at the parish of B., in the county of M.; and the said J. N., during all that time, hath acted in the most fair and honourable manner in the exercise of his said profession, to wit, at the parish aforesaid, in the county aforesaid. And that also, before the publishing of the said false, scandalous, malicious, and defamatory libel hereinafter mentioned, to wit, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid in the county aforesaid, the said J. N. was, in his business and profession of an attorney, employed and retained by one A. C. to commence and prosecute a certain suit and action at law upon the behalf of the said A. C. against one J. S., for the recovery of a certain sum of money then and long before due and owing to the said A. C. from and by the said J. S., and then remaining unpaid; and the said J. N., in pursuance of the instructions he then and there received from the said A. C. in that behalf, and of his retainer as aforesaid, did then and there commence and prose-

cute the said action against the said J. S., as in duty he was bound to do; but the said J. N., in the prosecution of the said action, so far from acting with any unnecessary severity towards the said J. S., on the contrary thereof, then and there acted towards him the said J. S. in as lenient a manner as was consistent with his duty as attorney to the said A. C. as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., late of the parish aforesaid, in the county aforesaid, grocer, well knowing the premises, but contriving, and wickedly, maliciously, and unlawfully intending to aggrieve and vilify the said J. N., and to injure him in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his clients, and neighbours, and other good and worthy subjects of this kingdom, and also to injure the said J. N. in his said business and profession of an attorney, and to cause him to be esteemed and taken to be a negligent and corrupt practiser in his said profession, and to be a person not fit to be intrusted and employed therein, afterwards, to wit, on the 10th day of August, in the year last aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, falsely, wickedly, and maliciously did write and publish, and cause and procure to be written and published, in the form of a letter directed to the said A. C., a certain false, wicked, malicious, and scandalous libel of and concerning the said J. N., and of and concerning his conduct in his business and profession of attorney, and of and concerning the said action, so commenced and prosecuted against the said J. S. by the said J. N., for and as the attorney of the said A. C. as aforesaid, and of and concerning the conduct of the said J. N. as attorney in the said action, according to the tenor and effect following, that is to say [*here set out the libel, with such innuendos as may be necessary; (see ante, p.* 523)]; to the great scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*As to the evidence, see ante, pp.* 527, 529.

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### *Indictment for Hanging a Man in Effigy.*

*Commencement as ante, p.* 612]—in the county aforesaid, unlawfully, wickedly, and maliciously did make, and cause and procure to be made, a certain gibbet and gallows, and also a certain effigy or figure, intended to represent the said J. N.; and then and there unlawfully, wickedly, and maliciously did erect, set up, and fix, and cause and procure to be erected, set up, and fixed, the said gibbet and gallows, in a certain yard and place near unto a certain common highway, there situate, called ———, and near to a certain ferry called The Horse Ferry, where the said J. N. was used and accustomed to ply in the way of his trade and business of a waterman; and then and there unlawfully, wickedly, and maliciously did hang up and suspend, and cause and procure to be hung up and suspended, the said effigy and figure to and upon the said gibbet and gallows, with the name of the said J. N. inscribed on a piece of wood and affixed to the said effigy and figure, together with divers scandalous inscriptions and devices affixed upon and about the same,

reflecting on the charaeter of the said J.; and did then and there keep and continue, and cause and procure to be kept and continued, the said gibbet and gallows, so erected and set up as aforesaid, with the said effigy and figure hung up and suspended to and from the same, as aforesaid, together with the several inscriptions and devices aforesaid, so affixed as aforesaid, for a long space of time, to wit, for the space of four days then next following and during all that time unlawfully, wickedly, and maliciously did then and there publish and expose the said gibbet and gallows, with the said effigy and figure thereon, to the sight and view of divers good and worthy subjects of our said lady the Queen, passing and repassing in and along the highway aforesaid; to the great scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Evidence.*

Prove the hanging in effigy, as described in the indictment; and prove that the figure was intended to represent the prosecutor. Give also, if necessary, evidence of circumstances from which the jury may presume malice on the part of the defendant. (*See ante, p.* 124).

# CHAPTER IV.

## OFFENCES AGAINST PUBLIC TRADE.



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## SECT. 1.

### SMUGGLING.

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#### MAKING SIGNALS TO SMUGGLING VESSELS.

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*Statute.*

8 & 9 *Vict. c.* 77, *s.* 136—*Venue*]—Enacts, that any indictment or information for any offence against this or any other act relating to the customs shall and may be inquired of, examined, tried and determined in any county in England, where the offence is committed in England, and in any county in Scotland, where the offence is committed in Scotland, and in any county in Ireland, where the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried.

Sect. 95—*Offences at Sea*]—Enacts, that in case any offence shall be committed upon the high seas against this or any other act relating to the customs or any penalty or forfeiture shall be incurred upon the high seas for any breach of such act, such offence shall, for the purpose of prosecution, be deemed and taken to have been committed, and such penalties and forfeitures to have been incurred, at the place or land, in the United Kingdom or the Isle of Man, into which the person committing such offence or incurring such penalty or forfeiture shall be taken, brought, or carried, or in which such person shall be found; and in case such place or land is situated within any city, borough, liberty, division, franchise, or town corporate, as well any justice of the peace for such city, borough, liberty, division, franchise, or town corporate, as any justice of the peace of the county within which such city, borough, liberty, division, franchise, or town corporate is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas; any charter or act of parliament to the contrary notwithstanding: provided always, that where any offence shall be committed in any

place upon the water, not being within any county of the United Kingdom, or where any doubt exists as to the same being within any county, such offence shall, for the purposes of this act be deemed and taken to be an offence committed upon the high seas.

Sect. 60—*Making Signals*]—Enacts, that no person shall, after sunset and before sunrise, between the twenty-first day of September and the first day of April, or after the hour of eight in the evening and before the hour of six in the morning, at any other time in the year, make, aid, or assist in making any signal, in or on board or from any vessel, or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coasts or shores, for the purpose of giving any notice to any person on board any smuggling vessel or boat, whether any person so on board of such vessel or boat be or be not within distance to notice any such signal; and if any person, contrary to the true intent and meaning of this act, make or cause to be made, or aid or assist in making, any such signal, such person so offending shall be guilty of a misdemeanor, and it shall be lawful for any person to stop, arrest, and detain the person or persons who shall so offend, and to carry and convey such person or persons so offending before any one or more of his Majesty's justices of the peace residing near the place where such offence shall be committed, who, if he sees cause, shall commit the offender to the next county gaol, there to remain until the next court of oyer and terminer, great session, or gaol delivery, or until such person or persons shall be delivered by due course of law; and it shall not be necessary to prove on any indictment or information, that any vessel or boat was actually on the coast, and the offender or offenders being duly convicted thereof, shall by order of the court before whom such offender or offenders shall be convicted, either forfeit and pay the penalty or forfeiture of one hundred pounds or, at the discretion of such court, be sentenced or committed to the common gaol or house of correction, there to be kept to hard labour for any term not exceeding one year.

Sect. 61—*Onus of Proof*]—Provides and enacts, that in case any person be charged with or indicted for having made or caused to be made, or for aiding or assisting in making any such signal as aforesaid, the burden of proof that such signal, so charged as having been made with intent and for the purpose of giving such notice as aforesaid, was not made with much intent and for such purpose, shall be upon the defendant, against whom such charge is made or such indictment is found.

### *Indictment.*

Kent, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of K., labourer on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, after sunset of the same day, and before sunrise on the day next following, to wit, at the reign of ten in the night of the same day, at the parish aforesaid, in the county aforesaid, unlawfully did make, and did aid and assist in making, and was then and there unlawfully present for the purpose of aiding and assisting in making, a certain light ("*any light, fire, flash, or blaze, or any signal by smoke, or by any rocket, fireworks, flags, firing of any gun, or other fire-arms, or*

*any other contrivance or device, or any other signal*") on a certain part of the sea-shore there situate, ("*in or on board or from any vessel or boat, or on or from any part of the coast or shore of the United Kingdom or within six miles of any part of such coast or shore*"), for the purpose then and there of making and giving a signal to some person or persons to the jurors aforesaid unknown, on board a certain smuggling vessel [*or boat*] then being; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 619.

*Misdemeanor, fine* 100*l., or imprisonment and hard labour in the common gaol or house of correction, for any term not exceeding one year.* 8 *&* 9 *Vict. c.* 87, *s.* 60. *The quarter sessions have cognizance of this offence. R.* v. *Cock*, 4 *M. & Sel.* 71.

*Evidence.*

All the prosecutor has to prove is, that the defendant made a signal by lighting a fire or otherwise, or was present aiding and assisting in so doing, on the sea-shore &c., as stated in the indictment. It is not necessary for him to prove that any smuggling vessel was in fact within sight or actually on the coast at the time: and it is for the defendant to prove (if he can) that the fire &c. was not lighted with the intent charged in the indictment. 8 *&* 9 *Vict. c.* 87, *s.* 61. The offence must be committed after sunset and before sunrise, between 21st September and 1st April, and after eight in the evening and before six in the morning in any other part of the year. *Id. s.* 60. *See R.* v. *Brown, M. & M.* 163.

The indictment for this and all other offences against this statute must be exhibited within three years next after the date of the offence committed. 8 *&* 9 *Vict. c.* 87, *s.* 134.

BEING ARMED AND ASSEMBLED FOR THE PURPOSE OF ASSISTING IN RUNNING UNCUSTOMED GOODS, &c.

*Statute.*

8 *&* 9 *Vict. c.* 87, *s.* 63]—Enacts, that, if any persons, to the number of three or more, armed with fire-arms or other offensive weapons, shall within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be assembled in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid, after seizure from the officer of the customs or other officer authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the customs, or in the

preventing the apprehension of any person who shall have been guilty of such offence; or in case any persons the number of three or more, so armed as aforesaid, shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court before which he shall be convicted, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

*7 W. 4 & 1 Vict. c.* 91, *s.* 2—*Place and Mode of Imprisonment.*]—(*Ante, p.* 468).

*Indictment.*

Kent, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of K., labourer, J. W., late of the same place, mariner, and E. W., late of the same place, labourer, together with divers other evil disposed persons, to the jurors aforesaid unknown, to the number of three or more, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, within the United Kingdom, ("*within the United Kingdom, or within the limits of any port, harbour, or creek thereof*"), to wit, at the parish aforesaid, in the county aforesaid, being then and there armed with fire-arms and other offensive weapons, to wit, with guns, pistols, swords, and daggers, then and there feloniously and unlawfully were assembled together, in order then and there to be aiding and assisting* in the illegal landing of certain goods then and there prohibited by law to be landed, ("*in the illegal landing, running, or carrying away of any prohibited goods liable to any duties which have not been paid or secured; or in rescuing or taking away any such goods as aforesaid, after seizure from the officer of the customs, or other officer authorized to seize the same, or any person or persons employed by them, or assisting them, or from the place where the same shall have been lodged by them; or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the customs, or in the preventing the apprehension of any person who shall have been guilty of such offence,*"); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, p.* 18, 629. *An indictment for being armed and assembled in order to be aiding and assisting in doing other acts mentioned in the statute, may readily be framed from the above precedent, by stating such act immediately after the asterisk.*

*Felony, transportation for life or not less than fifteen years, or imprisonment, not exceeding three years,* 8 *& 9 Vict. c.* 87, *s.* 63, *with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year.* 7 *W.* 4 *&* 1 *Vict. c.* 91, *s.* 2. (*ante, p.* 468).

*This offence is not triable at any quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendants, or some of them, together with other

persons unknown, to the number of three at least, were assembled and armed, as stated in the indictment. It is not necessary that all should be armed; if some be armed, and the others be present aiding and assisting, it will be sufficient. *R.* v. *Smith*, *R.* & *R.* 386. A variance between the indictment and evidence as to the kind of arms with which they were armed, does not seem to be material; if it be proved that the defendants were armed either with "firearms," or such other "offensive weapons" as are within the meaning of the act, it should seem to be sufficient. And in *R.* v. *Cosans*, 1 *Leach*, 342, 343, *n. a*, the court held, that not only guns, pistols, daggers, and other instruments of war, but also bludgeons, (properly so called), clubs, and such other things as are not in common use for any other purpose but as weapons, are within the meaning of the act. *See R.* v. *Hutchinson*, 1 *Leach*. 342. A common whip has been holden not to be an offensive weapon; *R.* v. *Fletcher*, 1 *Leach*, 23; and bats, which are long poles used by smugglers to carry tubs, have also been holden not to be offensive weapons within the repealed statute. 6 *G.* 4, *c.* 108, *s.* 56; *R.* v. *Noakes*, 5 *C.* & *P.* 226. If, in the heat of an affray, a man catch up a hatchet accidentally, this is not within the meaning of the statute. *R.* v. *Rose*, 1 *Leach*, 342, *n.* Also, to bring the case within the statute, it must appear that the parties had deliberately assembled for the purpose charged in the indictment.

The purpose for which the defendants assembled is proved, either expressly, by the evidence of an accomplice, or the like; or impliedly by evidence of circumstances from which the jury may fairly presume it.

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*Indictment for assisting in the Running of Uncustomed Goods.*

*The same as the last precedent, except that, instead of the words* "were assembled together in order to be aiding and assisting," *you insert these words:* "were aiding and assisting, and then and there feloniously and unlawfully did aid and assist" *in, &c.*

*Felony.* 8 & 9 *Vict. c.* 87, *s.* 63. *See the last precedent.*

*Evidence.*

Prove that the defendants, or the defendants and others, to the number of three at least, armed as mentioned in the evidence under the last precedent, were aiding and assisting in doing that which is charged against them by the indictment; as, for instance, in the running of uncustomed goods, &c. Reasonable proof must be given of the goods being uncustomed; that is, evidence must be given of some facts or circumstances from which the jury may fairly presume it. *See R.* v. *Shelly*, 1 *Leach*, 340, *n.*

SHOOTING AT VESSELS BELONGING TO THE NAVY, &C.

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*Statute.*

8 & 9 *Vict. c.* 87, *s.* 64.]—(*Ante, p.* 468).

*Indictment.*

Kent, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of K., mariner, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, on the high seas, and within one hundred leagues of a certain part of the coast of the United Kingdom, called ——, to wit, at the parish aforesaid, in the county aforesaid, feloniously and maliciously did shoot at and upon a certain vessel ("*vessel or boat*") belonging to her said Majesty's navy, ("*belonging to her Majesty's navy, or in the service of the revenue*") the said vessel being then on the high seas, within one hundred leagues of a certain part of the coast of the United Kingdom called ——, ("*in any part of the British or Irish Channel, or elsewhere on the high seas, within one hundred leagues of any part of the coast of the United Kingdom*"), to wit, at the parish aforesaid, in the county aforesaid; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the parish aforesaid, in the county aforesaid, was the place on land into which the said J. S. was next, after the commission of the offence by him the said J. S. as aforesaid, to wit, on the day and year aforesaid, taken and carried, ("*taken, brought, or carried,*") 8 & 9 *Vict. c.* 87, *s.* 95, (*ante, p.* 619).

*Felony.* 8 & 9 *Vict. c.* 87, *s.* 64. *See the precedent, p.* 468.

*This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence.*

Prove that the defendant wilfully shot at the vessel, &c., mentioned in the indictment; the malice will be presumed, until the contrary be shewn upon the part of the defendant. Where a custom-house vessel chased a smuggler, and fired into her without hoisting such a pendant as the 52 *G.* 3, *st.* 2, *c.* 104. *s.* 8, requires, the returning the fire was considered not to be malicious. *R.* v. *Reynolds, R. & R.* 465. Prove, also, that the vessel in question belonged at the time to her Majesty's navy, or was in the service of the revenue, as stated in the indictment; which may be done, it should seem, by parol testimony, without any documentary evidence. And prove that the vessel was at the time within one hundred leagues of the coast of some part of the United Kingdom.

BEING IN COMPANY WITH OTHERS WITH PROHIBITED GOODS, OR ARMED.

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*Statute.*

8 & 9 *Vict. c.* 87, *s.* 65]—Enacts, that if any person, being in company with more than four other persons, be found with any goods liable to forfeiture under this or any other act relating to the customs or excise, or in company with one other person, within five miles of the sea-coast or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, every such person shall be adjudged guilty of felony, and shall, on conviction of such offence, be transported as a felon for the space of seven years.

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*Indictment for being found with goods liable to Forfeiture.*

Kent, to wit:—The jurors for our lady the Queen, upon their oath present, that J. S., late of the parish of B., in the county of K., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, being then and there in company with divers other persons to the jurors aforesaid unknown, to the number of five and more, then and there was found feloniously with certain goods, then and there liable to forfeiture, under and by virtue of a certain act of Parliament relating to the revenue of the customs, ("*customs or excise*"), to wit, ———; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, pp.* 18, 619.

*Felony, transportation for seven years.* 8 & 9 *Vict. c.* 87, *s.* 65.

*Evidence.*

Prove that the defendant was in company with *more* than four persons, and was found with the goods stated in the indictment. Prove that the goods were liable to forfeiture by some statute relating to the customs or excise, as stated.

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*Indictment for being found Armed near a navigable River.*

*Commencement as in the last precedent*]—in the county aforesaid, being then and there feloniously in company with divers other persons, to the jurors aforesaid unknown, within five miles of a navigable river, ("*sea-coast or navigable river*"), to wit, within one mile from a certain navigable river, called ———, was then and there found, then and there feloniously carrying certain offensive arms, to wit, one pistol and one gun, ("*carrying offensive arms or weapons, or disguised in any way*"); against the form of the statute

in such case made and provided, and against the peace of our lady the Queen, her crown and dignity

*Felony. See the last precedent.* 8 & 9 *Vict. c.* 87, *s.* 65.

### *Evidence.*

Prove that the defendant was found within five miles of the navigable river mentioned in the indictment, in company with one other person, armed or disguised as stated. It does not seem clear, from this section, whether both must be armed or disguised.

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## Sect. 2.

### FRAUDULENT BANKRUPTCY.

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### *Statute.*

5 & 6 *Vict. c.* 122, *s.* 32.]—(*Ante, p.* 287).

### *Indictment against a Bankrupt for not surrendering.*

*Commencement as ante, p.* 287]—declared bankrupt, of all which notice in writing was then and there left at the usual place of abode of the said J. S., and notice was also then and there given in the London Gazette of the issuing of the said fiat, and of the sittings of thec ourt authorized to act in the prosecution of the said fiat against him the said J. S.; and the said J. S. so being declared bankrupt, and the said notice being so given as aforesaid, he the said J. S., feloniously did not, before three of the clock upon the day limited for the surrender of him the said J. S., to wit, the —— day of ——, in the year aforesaid, surrender himself to the said court, but wholly neglected and omitted so to do, nor hath he as yet surrendered himself to the said court, with intent then and there and thereby to defraud the creditors of him the said J. S.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *The indictment must allege an intent to defraud the creditors; these words in the statute override the whole section. Reg.* v. *Hill*, 1 *C. & K.* 168.

*Felony, transportation for life, or for not less than seven years, or imprisonment, with or without hard labour, in the common gaol, penitentiary, or house of correction, not exceeding seven years.* 5 & 6 *Vict. c.* 122, *s.* 32, (*ante, p.* 287).

*This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

### *Evidence.*

Prove the trading, petitioning creditor's debt, act of bankruptcy, fiat, and adjudication, as directed *ante, p.* 288; prove the notice at the abode of the bankrupt and in the Gazette, producing the latter, and a duplicate of the former, and prove the service thereof; and prove that he did not surrender himself within the time limited for that purpose.

Where a trader was in prison at the time he was declared bankrupt, *Littledale*, J., held that the commissioners might have brought him before them by warrant, and that it was not a case within the stat. 6 *G.* 4, *c.* 16, *s.* 122, of which this is in substance a re-enactment. *R.* v. *Mitchell*, 4 *C. & P.* 251. A bankrupt surrendered himself, but refused to answer, alleging that he was not a bankrupt; and the judges held that his refusal to answer was not an offence within the repealed statute 5 *G.* 2, *c.* 30, *s.* 1: *R.* v. *Page*, *R. & R.* 392.

As to bankrupts destroying, mutilating or falsifying their books, accounts, &c., see 5 & 6 *Vict. c.* 122, *s.* 39; (*ante, p.* 397).

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*Indictment against a Bankrupt for not discovering his Property.*

*Commencement as ante, p.* 287]—declared bankrupt, and afterwards, and within the time limited by law in that behalf, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, the said J. S. surrendered himself to the court authorized to act in the prosecution of the said fiat and was then and there duly sworn, and then and there submitted himself to be examined before the said court; and that the said J. S. then and there, upon the said examination, feloniously did not discover [*state the property concealed*], and that the said J. S. upon his said examination, then and there feloniously did not discover how, or to whom, or upon what consideration, or at what time or times, he disposed, assigned, or transferred the same, the same not having been really and *bonâ fide* before then sold or disposed of in the way of his trade, or laid out in the ordinary expenses of his family; with intent then and there to defraud the creditors of him the said J. S.; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Felony. See the last precedent.*

*Evidence.*

Prove the trading, petitioning creditor's debt, act of bankruptcy, fiat, and adjudication, as *ante, p.* 288. Produce the examination, and shew that the bankrupt had the property charged to have been concealed. Some evidence should be given to shew that the concealment was wilful: a mere accidental omission will not be within the statute.

## CHAPTER V.

### OFFENCES AGAINST PUBLIC POLICE AND ECONOMY.



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### SECT. 1.

### BIGAMY.

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*Statute.*

9 *G.* 4, *c.* 31, *s.* 22]—Enacts, that if any person, being married, shall marry any other person during the life of the former husband, or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county: provided always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his Majesty, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

*Indictment for Bigamy.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the first day of April, in the fifth year of the reign of our late sovereign lord William the Fourth, at the parish of C., in the county of D., did marry one A. C., spinster, and her the said A. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A. as aforesaid, to wit, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish of F., in the county of G., feloniously and unlawfully did marry and take to wife one M. Y., and to her the said M. was then and there married, the said A., his former wife, being then alive; against the form of the statute in such case made and provided, and against the peace of our lady the now Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the tenth day of August, in the year last aforesaid, at the said parish of B., in the county of M. aforesaid, was apprehended [*or*, that the said J. S. now is in custody at the said parish of B., in the county of M. aforesaid], for the felony aforesaid. *As to the venue, see ante, p.* 20. *The averment of the prisoner's apprehension is only necessary where the second marriage did not take place in the county where the defendant is indicted; but in such case it has been held to be essential; R.* v. *Fraser*, 1 *Mood. C. C.* 407. *So it was held also, by a majority of the judges, that where the indictment is found in a different county from that in which the offence was committed, it must allege that the prisoner was in custody, at the time of the finding of the inquisition, in the county of the finding. Reg.* v. *Whiley*, 2 *Mood. C. C.* 186.

*Felony, transportation for seven years, or imprisonment, with or without hard labour, not exceeding two years.* 9 *G.* 4, *c.* 31, *s.* 22.

*This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1, (*ante, p.* 69).

*Evidence on the part of the Prosecution.*

1. The marriage between the defendant and A. C. must be proved. The time at which it was celebrated is immaterial; and whether celebrated in this country or in a foreign country is also immaterial. 1 *Hale*, 692.

If celebrated abroad, it may be proved by any person who was present at it; and circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated. Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and custom of the foreign country, would be sufficient presumptive evidence of it, *see R.* v. *Inhabitants of Brampton*, 10 *East*, 282, so as to throw upon the defendant the *onus* of impugning its validity. (*See as to Scotch marriages, Dalrymple* v. *Dalrymple*, 12 *Haggard's Rep.* 54: *Ilderton* v. *Ilderton*, 2 *H. Bl.* 145: *Crompton* v. *Bearcroft*, *Bul. N. P.* 113). It is now established by the case of *Reg.* v. *Millis*, in the House of Lords (10

*Clark & Finnelly*, 534; see also *Catherwood* v. *Caston*, 13 *M. & W.* 261), that by the common law of England, a marriage between British subjects, although celebrated according to the rites of our church, is void, unless solemnized in the presence of a person in holy orders; and therefore that all marriages not so solemnized in those parts of the British dominions to which the Marriage Act, 26 *Geo.* 2, *c.* 33, does not extend, are still void, and will not subject the parties, if they afterwards contract a second marriage in the lifetime of both, to the penalties of bigamy. (*As to marriages of Roman Catholics in Ireland, see R.* v. *Hanley, Car. Sup.* 254: *Reg.* v. *Orgill*, 9 *C. & P.* 80. *As to French marriages, see Lacon* v. *Higgins*, 1 *D. & R. N. P.* 38; 3 *Stark.* 178. *As to marriages in the houses of ambassadors, &c., abroad, see* 4 *G.* 4, *c.* 91; *and as to marriages in Newfoundland.* 5 *G.* 4, *c.* 68).

If celebrated in this country, the marriage may be proved by the production of the register of the marriage, or an examined copy of it, together with some proof, either direct or presumptive, of the identity of the parties. (*Ante, p.* 135). The prisoner's admission of a prior marriage is evidence that it was lawfully solemnized. *Reg.* v. *Newton*, 2 *M. & Rob.* 503; *Reg.* v. *Simmonsto*, 1 *C. & K.* 164. If the marriage were by license, and celebrated under the stat. 26 *G.* 2, *c.* 33, it was necessary, by *s.* 11, if either of the parties were a minor at the time, to prove that the marriage was solemnized with the consent of the father, guardian, or mother of the minor, as required by that act; *R.* v. *Butler*, *R. & R.* 61: *R.* v. *Morton*, *Id.* 19, *n.*: *R.* v. *James*, *Id.* 17—*Per Bayley, J.*, in *Smith* v. *Huson*, 1 *Phillimore*, 287; but it seems that subsequent countenance from parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent. *R. & R.* 61, *n.* Provisions were made to remedy this by stat. 3 *G.* 4, *c.* 75, and 4 *G.* 4, *c.* 17, *s.* 2; and the late act, 4 *G.* 4, *c.* 76, *s.* 14, merely *requires* consent in such cases, but does not proceed to make void marriages solemnised without such consent; *R.* v. *Birmingham*, 8 *B. & C.* 29; and therefore such consent need not now be proved. *And see now the stat.* 6 *&* 7 *W.* 4, *c.* 85, *s.* 25. Where a minor was married without consent, in the interval between the 22nd July, 1822, (when the 3 *G.* 4, *c.* 75, received the royal assent, by which *s.* 11 of stat. 26 *G.* 2 *c.* 33, was repealed), and the 1st September, 1822, when the stat. 3 *G.* 4, *c.* 75, came into operation, it was holden that the marriage was valid, because, during that interval, there was no enactment in force relating to marriages by license. *R.* v. *Waully*, 1 *Mood. C. C.* 163. It was the intention of the Marriage Act that the banns should be published in the true names of the parties. Under the old act, 26 *G.* 2, *c.* 33, the rule on this subject was, that if the banns were published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication was invalid; and it was immaterial, in that case, whether the misdescription had arisen from accident or design, or whether it were fraudulent or not; but if there were a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names were such as the parties had used and been known by at one time, and not at another—in such cases the publication might or might not be

void, the supposed misdescription might be explained, and it became a most important inquiry, whether it was consistent with honesty of purpose, or was done from a fraudulent intention. *R.* v. *Inhabitants of Tibshelf*, 1 *B. & Ad.* 190. But now under the stat. 4 *G.* 4, *c.* 76, *s.* 22, in order to invalidate a marriage, the misdescription in the banns must be with the knowledge of both parties, for the words of the statute are "knowingly and wilfully." *R.* v. *Inhabitants of Wroxton*, 4 *B. & Ad.* 640. *See also stat.* 6 & 7 *W.* 4, *c.* 85, *ss.* 42, 43. Where a man and woman were married in Ireland, with the ceremonies making a marriage of Roman Catholics valid, they declaring themselves to be Roman Catholics, it was holden that the man could not, on an indictment for bigamy, set up his alleged Protestantism to defeat such marriage. *Reg.* v. *Orgill*, 9 *C. & P.* 80. A valid marriage must be proved; *Per Bayley*, J., in *Smith* v. *Huson*, 1 *Phillimore*, 287; the law will not presume it in case of bigamy, as it will in civil cases. *Ib.* It is not necessary, however, to prove the registration of the marriage, the license, or the publication of the banns; the marriage may be proved by some person who was actually present, and saw the ceremony performed. *R.* v. *Allison*, *R. & R.* 109, With respect to the place where the banns may be published and a marriage solemnised, *see the Marriage Acts*, 4 *G.* 4, *c.* 76, 6 *G.* 4, *c.* 92, *and* 6 & 7 *W.* 4, *c.* 85. The non-residence of the parties where the banns were published, or if by license, where the marriage was solemnised, is immaterial. 4 *G.* 4, *c.* 76, *s.* 26: *R.* v. *Hind*, *R. & R.* 253: 6 & 7 *W.* 4, *c.* 85, *s.* 25. It may be necessary to add, that the marriages of Jews, *see Luido* v. *Belesario*, 1 *Hag.* 216; *Goldsmid* v. *Bromer*, *Id.* 324; and Quakers, *see Dean* v. *Thomas*, *M. & M.* 361, where both parties are Jews or Quakers, were excepted out of the 4 *G.* 4, *c.* 70, (but they are now provided for by the 6 & 7 *W.* 4, *c.* 85, *s.* 2); nor does it extend to marriages beyond seas, or in Scotland. *See, as to marriages of illegitimate children by license in England, Priestly* v. *Hughes*, 11 *East*, 1.

Proof, however, of a marriage which is *voidable* merely, will support an indictment for bigamy. 3 *Inst.* 88. Thus a marriage by a minor, in Ireland, without consent, which by the Irish Marriage Act is voidable only within a year, will support a conviction for bigamy, if the marriage be not vacated. *R. v. Jacobs*, 1 *Mood. C. C.* 140. But it is otherwise, if the marriage be not voidable merely, but void; as, for instance, if a woman marry A., and, in the lifetime of A. marry B.; and after the death of A. and whilst B. is alive, she marry C., she cannot be indicted for bigamy, in her marriage with C., because her marriage with B. was a mere nullity. 1 *Hale*, 693. So, the marriage of an idiot, or of a lunatic not in a lucid interval, is void, because he is deemed in law incapable of entering into such a contract. 1 *Bl. Com.* 438, 439. So, if a boy under 14, or a girl under 12, contract matrimony, it is void unless both husband and wife consent to and confirm the marriage after the minor arrives at the age of consent. *Co. Lit.* 79. *See R.* v. *Gordon*, *R. & R*, 48. The stat. 5 & 6 *W.* 4, *c.* 54, *s.* 2, makes all marriages which thereafter should be celebrated between persons within the prohibited degrees of consanguinity or affinity, absolutely null and void to all intents and purposes.

2. The prosecutor must prove the defendant's subsequent marriage with M. Y. Formerly this must have been proved to have taken place in England; for it is the second marriage which constitutes the

offence; 1 *Hale*, 692, 693; but now it is immaterial whether the second marriage take place in England or elsewhere, provided, if the second marriage take place out of England, the defendant be a subject of his Majesty. 9 *G.* 4, *c.* 31, *s.* 22. This marriage is proved in the same manner as directed *ante, p.* 629. It seems, however, that the offence will be complete, though the defendant assume a fictitious name at the second marriage. *R.* v. *Allison, R & R.* 109. And where, upon an indictment for marrying Anna T., the defendant's first wife being alive, it appeared that her name was not Anna but Susanna; but the defendant wrote her name Anna in the note for the publication of banns, and signed the register in which she was so called; it was held, that although her name might not be Anna, he could not defend himself on the ground that he did not marry Anna T. *R.* v. *Edwards, R. & R.* 283. So also, where the second wife was married by the name of Eliza Thick, which name she had assumed when the banns were published, purposely, that she might not be known to be the person intended, (her name being Eliza Brown), *Gurney*, B., held it to be no answer to the charge. *R.* v. *Penson*, 5 *C. & P.* 412. Though the subsequent marriage would have been void, as for consanguinity or the like, the defendant is guilty of bigamy. *Reg.* v. *Brown*, 1 *C. & K.* 144.

3. It must be proved that the first wife was alive at the time the second marriage was solemnised; which may be done by some person acquainted with her, and who saw her at the time or afterwards.

4. If the defendant be not indicted in the county in which the second marriage took place, it must be proved that he was apprehended or is in custody in the county in which he is indicted. By the repealed statute 1 *Jac.* 1, *c.* 11, the defendant might be tried in the county where he was apprehended, but the words "in custody" were not in that act. Where the defendant, being in custody in the county of W. for larceny, a bill was preferred against him for bigamy in another county, upon which he was detained by order of the court; it was holden sufficient to warrant the trial in the county of W., because being in custody upon a criminal charge, he was liable to be tried where he was imprisoned. *R.* v. *Gordon, R. & R.* 48.

And it may be necessary to observe, that the first wife is not a competent witness to prove any part of the case, either for or against her husband, but the second wife is. (*Ante, p.* 147).

### *Evidence for the Defendant.*

The following are good defences to an indictment for bigamy.

1. That the wife or husband of the party indicted has been "continually remaining absent from the other for the space of seven years then last past, and has not been known by the other to be living within that time;" *i. e.*, has not been known at any period during the seven years to be alive. *Reg.* v. *Cullen*, 9 *C. & P.* 681; 9 *G.* 4, *c.* 31, *s.* 22. Where the defendant's first wife had left him 16 years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife, who it appeared had been living 17 miles from where the defendant (a poor labouring man) resided; he was held entitled to an acquittal under this proviso. *Reg.* v. *Thomas Jones, C. & Mar.* 614.

2. That before the second marriage, the party indicted was divorced from the bond of the first marriage. 9 *G.* 4, *c.* 31, *s.* 22. A

divorce *a vinculo*, for adultery, in a court in Scotland, of persons married in England, is not within the statute; because no sentence or act of any foreign country or state can dissolve an *English* marriage *a vinculo*, for grounds for which it cannot be dissolved in *England*. *R*. v. *Lolley*, *R*. & *R*. 237

3. That the former marriage was declared to be void by the sentence of a court of competent jurisdiction. 9 *G*. 4, *c*. 31, *s*. 22. The corresponding clause of the statute 1 *Jac*. 1, *c* 11, *s*. 3, was held not to extend to the sentence of an ecclesiastical court in a cause of jactitation; *Duchess of Kingston's case*, 11 *St*. *Tr*. 260; (*see ante*, *p*. 129); and even sentences within this clause of the act may be impeached on the part of the crown, upon the ground of fraud or collusion. *Id*.; 1 *Phil*. *Ev*. 388.

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## Sect. 2.

### COMMON NUISANCE.

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*Indictment for carrying on an Offensive Trade.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, near unto divers public streets being the Queen's common highways, and also near unto the dwelling-houses of divers liege subjects of our said lady the Queen there situate and being, unlawfully and injuriously did make, erect, and set up, and did cause and procure to be made, erected, and set up, a certain furnace and boiler, for the purpose of boiling tripe and other entrails and offal of beasts: and that the said J. S. on the day and year aforesaid, and on divers other days* and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did boil, and cause and procure to be boiled, in the said boiler, divers large quantities of tripe and other entrails and offal of beasts; by reason of which said premises, divers noisome, offensive, and unwholesome smokes, smells, and stenches, during the time aforesaid, were from thence emitted and issued, so that the air then and there was and yet is greatly filled and impregnated with the said smokes, smells, and stenches, and was and yet is greatly filled and impregnated with the said smokes, smells, and stenches, and was and is rendered and become and was and is corrupted, offensive, uncomfortable, and unwholesome, to the great damage and common nuisance of all the liege subjects of our said lady the Queen there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways; and against the peace of our lady the Queen, her crown and dignity. (*2nd Count for continuing the nuisance*).—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., on the said third day of August, in the year aforesaid, and from that day until the day of the taking of this inquisition, with force and arms,

at the parish aforesaid, in the county aforesaid, [a certain other furnace and boiler, for the purpose of boiling tripe and other entrails and offal of beasts, before that time made, erected, and set up by certain persons to the jurors aforesaid unknown, unlawfully and injuriously did continue and yet doth continue; and that the said J. S., on the said third day of August, in the year last aforesaid, and on divers other days], *&c., as in the first count, from the asterisk to the end. See the following precedents; for using a shop in a public market as a slaughter-house, C. C. C.* 301, *and see* 4 *Went.* 224;—*for erecting a manufactory for hartshorn, C. C. C.* 311;—*for erecting a privy near the highway* 4 *Went.* 225;—*for placing putrid carrion near the highway,* 4 *Went.* 213; *for keeping hogs near a public street and feeding them with offal, C. C. C.* 305, *and see* 2 *L. Raym.* 1163;—*for keeping a fierce and unruly bull in a field through which there was a footway, C. C. C.* 310;—*for keeping a ferocious dog unmuzzled, C. C. C.* 311;—*for baiting a bull in the king's highway,* 4, *Went.* 213. *See the stat.* 5 *&* 6 *W.* 4, *c.* 59, *s.* 3.

*Fine or imprisonment, or both; and the nuisance to be abated, if alleged and proved to be then continuing. See* 8 *T. R.* 143; 7 *T. R.* 467; 13 *East,* 164.

*The following provisions apply to the improper construction and negligent use of furnaces employed in working steam engines.*—1 *&* 2 *G.* 4, *c.* 41, *s.* 1—*Whereas great inconvenience has arisen, and a great degree of injury has been and is now sustained by his Majesty's subjects, in various parts of the united empire, from the improper construction as well as from the negligent use of furnaces employed in the working of engines by steam: and whereas by law every such nuisance, being of a public nature, is abateable as such by indictment: but the expense attending the prosecution thereof has deterred parties suffering thereby from seeking the remedy given by law: be it therefore enacted, &c., that it shall and may be lawful for the court by which judgment ought to be pronounced in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such award to be made either before or at the time of pronouncing final judgment, as to the court may seem fit. Section* 2 *provides and enacts, that if it shall appear to the court by which judgment ought to be pronounced, in case of conviction on any such indictment, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful for the court, without the consent of the prosecutor, to make such order touching the premises, as shall be by the said court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted. Section* 3 *provides and enacts, that the provisions of this act, as far a they relate to the payment of costs, and the alteration of furnaces, shall not extend or be construed to extend to the owners, or proprietors, or occupiers of any furnaces of steam-engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals, on or immediately adjoining the premises where they are raised.*

### *Evidence.*

Prove that the defendant erected the boiler in question, or that he continued it after being erected by some other person; prove that

he used it for the purposes alleged in the indictment; prove that the smoke or smell arising from it was either injurious to health, or so offensive as to detract considerably from the enjoyment of life and property in its neighbourhood; *see R.* v. *White*, 1 *Bur.* 333; it is not necessary that the smells produced by it should be injurious to health, it is sufficient if they be offensive to the senses; *R.* v. *Neil*, 2 *C. & P.* 485; and prove that it is in a populous neighbourhood, or near a highway; *R.* v. *Papineau*, 1 *Str.* 686; for its being a nuisance depends in a great measure upon the number of houses, and the concourse of people in its vicinity; and which is a matter of fact to be determined by the jury. *R.* v. *White*, 1 *Burr.* 333.

The defendant, on the other hand, it seems, may prove that the boiler was erected before the houses were built, or the roads constructed; *R.* v. *Cross*, 2 *C. & P.* 483; or in a neighbourhood where there were already established other trades, &c.; emitting smells extremely offensive or insalubrious, and which smells were not perceptibly increased by the alleged nuisance in question. *R.* v. *Neville*, *Peake*, 91: *R.* v. *Watts*, *M. & M.* 281. But it is no defence to say that the alleged nuisance has existed for a number of years; for no length of time will legalize a nuisance. *R.* v. *Cross*, 3 *Camp.* 227; *and see* 7 *East*, 199; 4 *Bing. N. C.* 183. It has been said, that in judging of a public nuisance, the public good it does may in some cases, where the public health is not concerned, be taken into consideration, to see if the public benefit outweigh the public annoyance; *R.* v. *Russell*, 6 *B. & C.* 566; 9 *Dowl. & Ryl.* 566; but this doctrine was overruled in the case of *Rex* v. *Ward*, 4 *Ad. & E.* 384: where it was held to be no answer to an indictment for a nuisance in a harbour, by erecting an embankment, that although the work was in some degree a hindrance to navigation, it was advantageous in a greater degree to other uses of the port. *See R.* v. *Morris*, 1 *B. & Ad.* 441; *R.* v. *Tindall*, 1 *Nev. & P.* 719; 6 *Ad. & E.* 143; *Reg.* v. *Randall*, *C. & Mar.* 496.

BAWDY-HOUSES AND GAMING-HOUSES.

*Statute.*

25 *G.* 2, *c.* 36, *s.* 8.]—And whereas, by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment: be it enacted, that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof.

Sect. 10—*No Certiorari*]—Enacts, that no indictment which shall, at any time after the said first day of June, be preferred against any

person for keeping a bawdy-house, gaming-house, or other disorderly house, shall be removed by any writ of *certiorari* into any other court; but such indictment shall be heard, tried, and finally determined at the same general or quarter session or assizes where such indictment shall have been preferred, (unless the court shall think proper, upon cause shewn, to adjourn the same), any such writ or allowance thereof notwithstanding.

3 *G.* 4, *c.* 114.—(*Ante, p.* 590).

*Indictment for Keeping a Bawdy-House.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, and A. his wife, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms at the parish aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common ill-governed and disorderly house; and in the said house, for the lucre and gain of him the said J. S., certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and on the said other days and times, there unlawfully and willingly did cause and procure to frequent and come together; and the said men and women, in the said house of him the said J. S., at unlawful times as well in the night as in the day, then and on the said other days and times, there to be and remain drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit; to the great damage and common nuisance of all the liege subjects of our said lady the Queen there inhabiting, being, residing, and passing, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine or imprisonment, or both, and, by* 3 *G.* 4, *c.* 114, *hard labour. A married woman may be indicted with her husband for this offence. R.* v. *Williams,* 1 *Salk.* 383. *The indictment shall not be removed by certiorari,* 25 *G.* 2, *c.* 36, *s.* 10; *unless upon the part of the crown; R.* v. *Davies,* 5 *T. R.* 626; *and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shewn, think proper to adjourn the same.* 25 *G.* 2, *c.* 36, *s.* 10.

*Evidence.*

Prove that the house in question, or a room or rooms in it, were let out for the purposes mentioned in the indictment. And if a lodger let her apartment for the purpose of indiscriminate prostitution, it is as much a bawdy-house as if she held the whole house. *R.* v. *Pierson,* 2 *L. Raym.* 1197; 1 *Salk.* 382.

Secondly, prove that the defendants "acted or behaved as master or mistress, or as the persons having the care, government, or management" of the house in question; which is sufficient evidence that the defendants kept the house. 25 *G.* 2, *c.* 36, *s.* 8.

And, thirdly, prove the house to be situate in the parish mentioned in the indictment; for this being matter of local description, it must be proved as laid, otherwise the defendant must be acquitted. (*See ante, p.* 98).

### *Indictment for Keeping a common Gaming-House.*

*Commencement as in the last precedent*]—in the county aforesaid, unlawfully did keep and maintain a certain common gaming-house; and in the said common gaming-house, for lucre and gain, on the said third day of August in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come, to play together at a certain unlawful game of cards called *Rouge et noir;* and in the said common gaming house, on the said third day of August in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain, playing and gaming at the said unlawful game called *Rouge et noir*, for divers large and excessive sums of money; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the said third day of August, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common gaming-room in the house of one J. N., there situate; and in the said common gaming-room, *&c. &c., as in the last count, only substituting* "gaming-room," *for* "gaming-house." *This precedent was holden good in R.* v. *Rogier*, 2 *D. & R.* 431; 1 *B. & C.* 272. *In R.* v. *Taylor*, 3 *B. & C.* 502, *Holroyd, J., said, that in his opinion, it would be sufficient merely to have alleged that the defendant kept a common gaming-house.*

*Fine and imprisonment, or both, and, by* 3 *G.* 4, *c.* 114, (*ante, p.* 590), *hard labour. The indictment shall not be removed by certiorari*, 25 *G.* 2, *c.* 36, *s.* 10, *unless on the part of the Crown. R.* v. *Davies*, 5 *T. R.* 626; *and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shewn, think proper to adjourn the same.* 25 *G.* 2, *c.* 36, *s.* 10.

### *Evidence.*

Prove that the house in question, or a room or rooms in it, were used for the purpose mentioned in the indictment. *See* 5 *T. R* 338. As to the evidence sufficient for this purpose, *see* 8 *&* 9 *Vict. c.* 109, *ss.* 2, 5; (*post, p.* 656). Prove that the defendant "acted or behaved as master or mistress, or as the person having the care, government, or management" of the house or room in question; which is sufficient evidence that the house or room was kept by the defendant. 25 *G.* 2, *c.* 36, *s.* 8. And lastly, prove the house to be situate with the parish mentioned in the indictment. (*See ante, p.* 41).

Keeping and maintaining a common gaming-house for lucre and gain, and causing and procuring idle and disorderly persons to come there to play at *Rouge et noir*, and permitting such persons to play

there at such game for money, is an indictable offence at common law. *R.* v. *Rogier*, 1 *B. & C.* 272; 2 *D. & R.* 431.

After an indictment has been preferred by a private prosecutor, the court will allow any other person to go on with it, even against the consent of the prosecutor. *R.* v. *Wood*, 3 *B. & Adol.* 657.

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HIGHWAYS IN GENERAL.

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*Statutes.*

*5 & 6 W. 4, c. 50, s. 95—Mode of Proceeding if Obligation to repair is disputed.*]—If, on the hearing of any summons respecting the repair of any high way, (*see s.* 94), the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required, to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish, or the party to be named in such order, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be directed by the judge of the assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this act, in the parish in which such highway shall be situate: Provided nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to remove such indictment by *certiorari* or otherwise into his Majesty's court of King's Bench.

Sect. 96—*Levying and Application of Fines*]—Enacts, that no fine, issue, penalty, or forfeiture for not repairing the highways, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer, or other court, but shall be levied by and paid into the hands of such person or persons residing in or near the parish, township, or place, where the road shall lie, as the justices or court imposing such fines, issues, penalties, or forfeitures shall order and direct, to be applied towards the repair and amendment of such highway; and the person or persons so ordered to receive such fine, shall and is hereby required to receive, apply, and account for the same, according to the direction of such court, or in default thereof shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture, to be imposed on any such parish, township, or place, for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township, or place, then

such inhabitant shall and may make his complaint to the justices at a special sessions for the highways; and the said justices are hereby empowered and authorized, by warrant under their hands to make an order on the surveyor of the parish for the payment of the same out of the money receivable by him for the highway rate, and shall within two months next after service of the said order on him pay unto such inhabitant the money therein mentioned.

Sect. 98—*Costs*]—Enacts, that it shall and may be lawful for the court before whom any indictment shall be preferred for not repairing highways to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment or presentment was frivolous or vexatious.

Sect. 99—*Proceeding by Presentment abolished*]—Enacts, that from and after the commencement of this act, it shall not be lawful to take or commence any legal proceeding, by presentment, against the inhabitants of any parish or other person, on account of any highway or turnpike road being out of repair. *See R.* v. *St. Mawgan in Mencage*, 8 *Ad. & Ell.* 496; 3 *Nev. & P.* 502.

Sect. 107—*Certiorari*]—Enacts, that no rate nor any proceeding to be had touching the conviction of any offender against this act, or any order made, or any other matter or thing done or transacted in or relative to the execution of this act, shall be vacated for want of form, or be removed or removable (except as herein mentioned—*i. e. in case of appeal, where the sessions grant a case, s.* 108) by certiorari, or any other writ or process whatever, into any of his Majesty's courts of record at Westminster.

Sect. 100—*Competency of Witnesses*]—Enacts, that no person shall be deemed incompetent to give evidence or be disqualified from giving testimony or evidence in any action, suit, prosecution, or other legal proceedings to be brought or had in any court of law or equity, or before any justice or justices of the peace, under or by virtue of this act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of this act, nor shall such testimony or evidence for any of the reasons aforesaid be rejected, or liable to be questioned or set aside.

3 *Geo.* 4, *c.* 126, *s.* 110—*Fine for Non-repair of Turnpike Road*]—Enacts, that when the inhabitants of any parish, township, or place shall be indicted (*or presented*) for not repairing any highway, being a turnpike road, and the court before whom such indictment (*or presentment*) shall be preferred, shall impose a fine for the repair of such road, such fine shall be apportioned, together with the costs and charges attending the same between the inhabitants of such parish, township, or place, and the trustees or commissioners of such turnpike road, in such manner as to the said court, upon consideration of the circumstances of the case, shall seem just; and it shall and may be lawful for such court to order the treasurer of such turnpike road to pay the sum so proportioned for such turnpike road, out of the money

then in his hands, or next to be received by him, in case it shall appear to such court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the securities of the creditors who have advanced their money upon the credit of the tolls to be raised thereupon, which orders shall be binding upon such treasurer, and he is hereby authorized and required to obey the same.

### *Indictment for Obstructing a Common Highway.*

*Commencement as ante, p.* 633]—in the county aforesaid, in a certain street there called Leman Street, being the Queen's common highway, used for all the liege subjects of our lady the Queen, with their horses, coaches, carts, and carriages, to go, return, pass, repass, ride, and labour, at their free will and pleasure, unlawfully and injuriously did [put and place three empty drays, and did then and on the said other days and times there unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in and upon the Queen's common highway aforesaid for the space of several hours, to wit, for the space of five hours on each of the said days]; whereby the Queen's common highway aforesaid, then and on the said other days and times, for and during all the time aforesaid on each of the said days respectively, was obstructed and straitened, so that the liege subjects of our said lady the Queen could not then and on the said other days and times go, return, pass, repass, ride, and labour, with their horses, coaches, carts, and other carriages, in, through, and along, the Queen's common highway aforesaid, as they ought and were wont and accustomed to do: to the great damage and common nuisance of all her Majesty's liege subjects going, returning, passing, repassing, riding, and labouring, in, through, and along, the Queen's common highway aforesaid; to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *See precedents of obstructing a highway by continuing a hedge across it, C. C. C.* 307; —*by erecting a gate across it,* 6 *Went.* 401, 405; *Reg.* v. *Botfield,* 1 *C. & Mar.* 151;—*by building or continuing a building upon it,* 4 *Went.* 181, 191; 1 *Ad. & E.* 822;—*by placing carts upon it for the sale of vegetables, C. C. C.* 305;—*by laying soil upon it, C. C. C.* 303;—*by laying rubbish upon it, C. C. C.* 315;—*by digging holes in it, C. C. C.* 303, 314;—*by digging a horsepond and erecting a cistern in it, C. C. C.* 304;—*by stopping a watercourse and thereby overflowing the highway, C. C. C.* 376:—*by exhibiting effigies at a window, and thereby attracting a crowd. R.* v. *Carlisle,* 6 *C. & P.* 637.

*Fine or imprisonment, or both. Nuisances, as far as relates to highways, is of two kinds: positive, by obstruction; and negative, by want of reparations. The latter we shall consider presently.*

### *Evidence.*

Prove the way in question to be a common highway. (*See post, p.* 645). Prove the obstruction, as stated in the indictment; and prove that it was productive of inconvenience to persons passing through the street, either in carriages or on foot. Where a waggoner occupied one side of a public street in a city, before his warehouses, in

loading and unloading his waggons, for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouses, so that no carriages could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying upon the ground ready for loading; this was holden to be a public nuisance, although it appeared that there was room for two carriages to pass on the opposite side of the street. *R.* v. *Russell*, 6 *East*, 427; *and see R.* v. *Cross*, 3 *Camp.* 227.

Where a statute enacted, that the erection of a building within certain limits should be deemed a "common nuisance," and also gave a summary remedy, by proceedings before magistrates, it was held that the offender might be indicted for the nuisance. *R.* v. *Gregory*, 5 *B. & Ad.* 555. (*See ante, p.* 2).

### *Indictment for Obstructing the Navigation of a Public River.*

Gloucestershire, to wit:—The jurors for our lady the Queen upon their oath present, that the River Severn, that is to say, a certain part of the said river lying and being in the county of Gloucester, is, and from the time whereof the memory of man is not to the contrary, hath been, an ancient river, and the Queen's ancient and common highway for all the liege subjects of our lady the Queen and her predecessors, with their ships, barges, lighters, boats, wherries, and other vessels, to navigate, sail, row, pass, repass, and labour, at their will and pleasure, without any impediment or obstruction whatsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish of B., in the county aforesaid, fisherman, on the third day of August, in the fourth year of the reign of our sovereign lady Victoria, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, and injuriously did [erect, fix, put, place, and set in the said river, and Queen's ancient and common highway there, near a certain place called Guy's Shard, a certain snare, trap, machine, and engine, commonly called Putts, for the taking and catching of fish, and composed of wood, wooden stakes, and twigs; and that he the said J. S., on the said third day, of August, in the year last aforesaid, and on divers other days and times between that day and the day of the taking this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, in the said river and Queen's ancient and common highway there, the said snare, trap, machine, and engine, called Putts, unlawfully, wilfully, and injuriously did continue, and still doth continue, so erected, fixed, put, placed, and set in the said river and Queen's ancient and common highway as aforesaid]; by means whereof the navigation and free passage of, in, through, along, and upon the said river Severn, and the Queen's ancient and common highway, on the day and year aforesaid, and on the said other days and times, hath been, and still is, greatly straitened, obstructed, and confined, to wit, at the parish aforesaid, in the county aforesaid, so that the liege subjects of our said lady the Queen, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river, and Queen's ancient and common highway there, on the same day and

year aforesaid, and on the said other days and times, could not, nor yet can, go, navigate, sail, row, pass, repass, and labour with their ships, barges, lighters, boats, wherries, and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and Queen's ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river Severn, and Queen's ancient and common highway there, to the great obstruction to the trade and navigation of and upon the said river, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine or imprisonment, or both. Also, to divert a part of a public river, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance.* 1 *Hawk.* c. 75, s. 11. *But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, yet the owner is not indictable as for a nuisance, for not removing it. R.* v. *Watts,* 2 *Esp.* 675. *See R.* v. *Russell and Others,* 9 *D. & R.* 566; 6 *B. & C.* 566: *R.* v. *Ward.* 4 *Ad. & E.* 384; 6 *Nev. & M.* 38: *R.* v. *Tindall,* 1 *Nev. & P.* 719; 6 *Ad. & E.* 143: *R.* v. *Morris,* 1 *B. & Ad.* 441; *Reg.* v. *Randall, C. & Mar.* 496, (*ante, p.* 635).

*Evidence.*

Prove that the river in question is public and navigable, in that part of it which was obstructed; and prove the obstruction stated in the indictment, in the same manner as under the last precedent. Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage, occasioned by these staiths, was for a public purpose, and occasioned a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed out to the jury that, by reason of the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; it was holden that this direction was right. *R.* v. *Russell,* 9 *D. & R.* 566, *Lord Tenterden, C. J., dissentiente;* 6 *B. & C.* 566. *But see R.* v. *Ward,* 6 *Nev. & M.* 38; 4 *Ad. & E.* 384; (*ante, p.* 635).

*Indictment against a Parish for not repairing a Highway.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that from the time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient Queen's highway, leading from the town of Hatfield, in the county of Hertford, towards and unto the city of London, used by and for all the liege subjects of our lady the Queen and her predecessors, with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride and labour at their free will and pleasure; and that a certain part of the said common and ancient Queen's high-

way, called —— lane, situate, lying, and being in the parish of Fryern Barnet, in the county of Middlesex, extending from a certain field there, called ——, unto a certain bridge called —— bridge, containing in length forty yards, and in breadth eight yards, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, and continually afterwards until the day of the taking of this inquisition, at the parish aforesaid, in the county last aforesaid, was and is yet very ruinous, miry, deep, broken, and in great decay, for want of due reparation and amendment of the same; so that the liege subjects of our said lady the Queen, during the time last aforesaid, could not go, return, pass, repass, ride, and labour with their horses, coaches, carts, and other carriages, in, through and along the Queen's common highway aforesaid, as they ought and were wont and accustomed to do, without great danger of their lives, and the loss of their goods; to the great damage and common nuisance of all her majesty's liege subjects, going, returning, passing, repassing, riding, and labouring, in, through, and along the Queen's common highway aforesaid; to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity:* And that the inhabitants of the said parish of Fryern Barnet, in the said county of Middlesex, the common highway as aforesaid, so as aforesaid being in decay, ought to repair and amend, when and so often as it should or shall be necessary.

*If there be other parts of the highway out of repair, within the same parish, insert other counts specifying them. An indictment against a parish for not repairing a horse and foot way is the same as the above, only substituting for the word* "highway," *the words* "pack and prime way," *and for the words* "with their horses, coaches, carts," *&c. in the commencement, substituting the words* "on horseback and on foot, to go, return, pass, repass, ride, labour, and drive their cattle at their free will and pleasure;" *and for the words* "with their horses, coaches, carts, and other carriages," *near the end of the count, substituting the words* "with their horses and cattle." *The indictment usually states the highway to have been so immemorially, but this is unnecessary; it is sufficient to allege that it is a common public highway, without shewing how it became so; Aspinall* v. *Brown*, 3 *T. R.* 265; *and it is prudent to plead it thus, particularly where it is not an ancient way. So, although usual, it is unnecessary to shew the* termini *of the way;* 2 *Saund.* 158 *c; R.* v. *Haddock, Andr.* 145 : *R.* v. *St. Weonard's*, 6 *C. & P.* 582; *yet perhaps it is safer to do so.* 1 *Hawk. c.* 76, *ss.* 86, 87. *But if stated, they must be stated correctly, for a variance between the indictment and evidence in this respect would be fatal. R.* v. *Great Canfield*, 6 *Esp.* 136 : *R.* v. *St. Weonard's, supra. If the highway be described as leading from the township of A. unto the town of B., the* termini *A. and B. are excluded; and therefore, if the offence was committed in the township of A., the defendant must be acquitted. Reg.* v. *Botfield, C. & Mar.* 157. *Where a public footway led from A. to the gate of a church-yard, and communicated through that gate by a public path which in one part of it formed an acute angle with the church, it was held that it might be described as a footway leading from A. towards and unto the church. R.* v. *Marchioness of Downshire*, 4 *Ad. & E.* 232; 5 *Nev. & M.* 662. *Where the indictment stated the way to be a carriage way leading from the town of A., in the county of B., towards and unto the village of E. in the same county, and the part charged to be*

*out of repair was a portion of a lane called F. lane; and it appeared in evidence that, to go from the town of A. to the village of E. with a carriage, a person must go four miles along the C. turnpike road, then all along F. lane, and then cross the W. turnpike road, and for a short distance go along a road which goes from the W. turnpike road to the village of E.; it was held that the road was not misdescribed. Reg.* v. *Steventon,* 1 *C. & K.* 55. *The indictment, however, must shew with certainty the part of the road which is out of repair, how many yards in length, how many in breadth, &c.* 1 *Hawk. c.* 76, *ss.* 88, 89; *but see* 2 *Saund.* 158 *d; and that it is within the parish; see Cowp.* 111; 3 *T. R.* 509; 7 *B. & C.* 413; *R.* v. *Upton,* 6 *C. & P.* 133; *and if the parish be situate part in one county and part in another, the indictment must be against the whole parish although the road out of repair were in a part of the parish lying in one county only; R.* v. *Inhabitants of Clifton,* 5 *T. R.* 498; *see* 4 *Burr.* 2507, *cont.; but the venue must nevertheless be laid in the county where that part of the road out of repair was situate. Where two parishes are separated by a river, the* medium filum aquæ *is the presumptive boundary between them. R.* v. *Landulph,* 1 *M. & Rob.* 393. *Where a public way crosses the bed of a river, which washes over it at every tide, and leaves a deposit of mud, the parish is not bound to make it good. Ib.*

*Fine. As to the levying and application of such fine, see* 5 *&* 6 *W.* 4, *c.* 50, *s.* 96, (*ante, p.* 638); 12 *East,* 566; *and* 3 *G.* 4, *c.* 126, *s.* 110, (*ante, p.* 639). *As to the costs, see* 5 *&* 6 *W.* 4. *c.* 50, *ss.* 95, 98, (*ante, p.* 639). *Where, the obligation to repair being disputed, an indictment is directed under s.* 95, *and the defendants are convicted, the prosecutor is entitled as matter of right to an order for costs under that section. Reg.* v. *Inhabitants of Yarkhill,* 9 *C. & P.* 218: *but not where the defendants are acquitted on the ground of its not having been proved to be a highway, Rev.* v. *Inhabitants of Chedworth, Id.* 285; *Reg.* v. *Inhabitants of Paul,* 2 *M. & Rob.* 307; *Rev.* v. *Inhabitants of Heanor,* 14 *Law J., N.S., Q.B.,* 87. *It had been ruled that, on the trial of an indictment preferred under s.* 95, *the judge has no power to award costs for a frivolous defence under s.* 98; *the power being, as it was said, limited to the court at which the prosecution was originally preferred: Reg.* v. *Inhabitants of Preston,* 2 *M. & Rob.* 137: *but this seems not to be maintainable. See R.* v. *Inhabitants of Upper Papworth,* 2 *East,* 413; *Reg.* v. *Inhabitants of Pembridge,* 3 *G. & D.* 5. *And a judge who tries, at Nisi Prius, an indictment preferred under s.* 95, *and removed by certiorari, has the power to award costs under that section; Reg.* v. *Inhabitants of Great Broughton,* 2 *M. & Rob.* 444; *and where it was not preferred under s.* 95, *he has the same power under s.* 98; *Reg.* v. *Pembridge, supra: overruling previous cases to the contrary; Reg.* v. *Inhabitants of Paul, supra; Reg.* v. *Challicombe,* 2 *M. & Rob.* 311. *The Court of Queen's Bench has the like power; Reg.* v. *Inhabitants of Preston,* 7 *Dowl.* 93. *See* 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 10; (*ante, p.* 66).

*General Issue.*

And J. S. and J. N., two of the inhabitants of the said parish of Fryern Barnet, by A. B. their attorney, for themselves and the rest of the inhabitants of the said parish, come into court here, and having heard the said indictment read, say, they are not guilty

of the said premises in the said indictment above specified and charged upon them; and of this they put themselves upon the country, &c. (*See ante, p.* 94).

## *Evidence for the Prosecution, under the General Issue.*

1. The prosecutor must prove that the road or street in question is a public highway, that is to say, a way open and common to all persons. 1 *Hawk.* c. 76, *s.* 1; *see* 8 *T. R.* 634; 11 *East,* 376, *n.*; 5 *Taunt.* 125; 1 *Camp.* 260; 4 *Camp.* 16; 4 *B. & Ald.* 447; 1 *B. & Ad.* 32; 2 *M. & Rob.* 307. And if the *termini* be set out in the indictment, they must be proved as laid. *R.* v. *Great Canfield, R.* v. *St. Weonard's,* (*ante, p.* 644). A road dedicated to and used by the public becomes a highway which the parish must repair, although neither such dedication nor such use have been adopted nor acquiesced in by the parish. *R.* v. *Leake,* 5 *B. & Ad.* 469; 2 *Nev. & M.* 583. The stat. 5 & 6 *W.* 4, *c.* 50, does not apply retrospectively to roads completely public by dedication before the act, but only to roads then made, and in progress of dedication. *Reg.* v. *Westmark,* 2 *M. & Rob.* 305. *See s.* 23.

2. He must prove that that part of the road in question, out of repair, is within the parish charged by the indictment, and any local description given of the part out of repair must be proved as laid. (*See ante, p.* 41). But want of certainty in such description cannot be taken advantage of under the general issue. *R.* v. *Hammersmith,* 1 *Stark.* 357.

3. He must prove the part of the road so described to be out of repair, as stated in the indictment. *See* 2 *L. Raym.* 1169.

4. It is not necessary, however, to prove the liability of the parish to repair; for the law presumes that, until the contrary is shewn.

It may be necessary to observe, that the surveyor of the parish is a competent witness for the prosecution, 5 & 6 *W.* 4, *c.* 50, *s.* 100, (*ante, p.* 639), and also for the defendants. So, an inhabitant of the parish (even, it seems, the prosecutor himself, *see* 1 *Stark.* 357) is a competent witness for the prosecution; *see* 3 *G.* 4, *c.* 126, *s.* 137; *R.* v. *Hayman, M. & M.* 401; and it would seem since the recent statute 5 & 6 *W.* 4, *c.* 50, *s.* 100, (*ante, p.* 639), for the defendants also; though the latter was not the case before; *see* 15 *East,* 474; 1 *B. & Ald.* 78; 1 *M. & Rob.* 286; 1 *Ad. & E.* 744; (*ante, p.* 145). *See now the stats.* 3 & 4 *Vict. c.* 26, *s.* 1, (*ante, p.* 145), *and* 6 & 7 *Vict. c.* 85, (*ante, p.* 144). Under the 3 & 4 *Vict. c.* 26, an owner of lands within the parish is a competent witness for the defendant, though he be not a *rated* inhabitant, the lands being occupied by tenants, who are rated for them. *Reg.* v. *Doddington,* 1 *Q. B.* 411.

The declarations of inhabitants are good evidence against the parish, for they are parties to the record, whether rated or not, and though by statute they are *competent* witnesses, they are not *compellable* to attend as witnesses. *Reg.* v. *Inhabitants of Addenbury East;* 1 *Dav. & M.* 324.

## *Evidence for the Parish, under the General Issue.*

Under the general issue, the parish may prove that the road in question is not a common highway, or that it is in good and suffi-

cient repair, or that the part out of repair is not within the parish. 2 *Saund.* 151 *b, in notis: R.* v. *Inhabitants of Norwich,* 1 *Str.* 181, 182, 183. But they cannot prove the liability of particular persons *ratione tenuræ* or the like, to repair the road in question; that defence must be made the subject of a special plea, in all cases. *R.* v. *St. Andrews,* 1 *Mod.* 112; *Anon.,* 1 *Vent.* 356; 1 *Hawk. c.* 76, *s.* 9; 2 *Saund.* 159, *n.* 10, unless the parish have been relieved of their liability by a public statute. 3 *Camp.* 222: *see* 1 *L. Raym.* 725; 2 *T. R.* 106; 2 *B. & Ald.* 179.

The inhabitants of a parish are not bound to repair a way used by the public and repaired by the parish for twenty years, if there be no owner who could dedicate it, and the repairs by the parish be shewn to have been begun and continued under a mistaken notion of the liability to repair. *R.* v. *Edmonton,* 1 *M. & Rob.* 24. *See R.* v. *Leake, supra.*

It may be observed, that after the verdict for the defendants for the non-repair of a highway, the court will not grant a new trial on the ground of the improper rejection of evidence; but they will suspend the judgment, in order that another indictment may be prepared. *R.* v. *Sutton,* 5 *B. & Ad.* 52; 2 *Nev. & M.* 57.

*Plea that others,* ratione tenuræ, *are bound to repair.*

And J. S. and J. N., two of the inhabitants of the said parish of Fryern Barnet, by A. B., their attorney, for themselves and the rest of the inhabitants of the said parish, (excepting one A. C.), came into court here, and having heard the said indictment read, say, that our lady the Queen ought not further to prosecute the said indictment against the inhabitants of the parish last aforesaid (excepting the said A. C. as aforesaid); because they say, that as to the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken, and in great decay, the said A. C., by reason of his tenure of certain lands and tenements called ———, lying and being in the said parish, ought to repair and amend the said part of the said highway so alleged to be ruinous, miry, deep, broken, and in decay as aforesaid, when and so often as there should be occasion [as the said A. C., and all those who held the said lands and tenements for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do, and the said A. C. still of right ought to do]. And this they the said J. S. and J. N., are ready to verify; wherefore they pray judgment, and that they and the rest of the inhabitants of the said parish of Fryern Barnet, (excepting the said A. C. as aforesaid), by the court here may be dismissed and discharged from the said premises, in the said indictment above specified. *See the precedents, C. C. C.* 322, 391; 4 *Went.* 162, 171, 176, 184; 6 *Went.* 411. *It is not necessary, (although usual), to allege the prescription, as in the above precedents between the crotchets.* 2 *Saund.* 158 *e, n.* (9). *It is usual also, after stating the liability to repair* ratione tenuræ, *to add a special traverse of the liability of the parish to repair; but this is improper, and probably demurrable, as being a traverse of a conclusion of law. See* 1 *Saund.* 23, *n.* (5); 2 *Saund.* 159 *a. n.* (10). *See, however, R.* v. *Inhabitants of Ecclesfield,* 1 *B. & Ald.* 348. *It may be necessary here to mention, that an individual cannot be bound by prescription to repair a highway, unless it be in respect of the tenure of his*

*land, taking of toll, or other profit.* 2 *Saund.* 158 *f, n.* (9). *Nor can a parish get rid of its liability to repair, and throw the burden upon an individual, by reason of any agreement between the individual and others.* 3 *East,* 86. *It is therefore necessary, in all cases where the parish in which the road is situate throws the liability to repair upon an individual or upon another parish, &c. to state in the plea the consideration for such liability; merely stating a prescription will not be sufficient, except in the case of a corporation sole or aggregate, who may be bound by a prescription or usage, without consideration; R.* v. *St. Giles,* 5 *M. & Sel.* 260; *and except, also, where the liability is thrown upon a district or township in the same parish, there an immemorial custom for the district to repair all the roads within it may be pleaded, without expressly stating any consideration for it, for the consideration appears sufficiently upon the face of it. R.* v. *Ecclesfield,* 1 *B. & Ald.* 348; *and R.* v. *Inhabitants of W. R. of Yorkshire,* 4 *B. & Ald.* 623.

*Replication.*

And hereupon N. W. [*the clerk of the peace or clerk of the arraigns*], who prosecutes for our said lady the Queen in this behalf, says, that by reason of anything in the said plea above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said inhabitants of the said parish of Fryern Barnet: because he says* that the said A. C. ought not to repair or amend the said part of the said highway so alleged to be ruinous, miry, deep, broken, and in decay as aforesaid, by reason of his said tenure, in manner and form as in and by the said plea is above supposed and alleged: and this he the said N. W. prays may be inquired of by the country. And the said J. S. and J. N., for themselves and the rest of the inhabitants of the parish of Fryern Barnet aforesaid, do the like. Therefore let a jury, &c. &c.

*Evidence.*

In order to support this plea, the defendants must prove that A. C. is the occupier of the lands and tenements mentioned in the plea; for it is the occupier who is liable, whether he be owner or not. *R.* v. *Watts,* 1 *Salk.* 357; *R.* v. *Bucknell,* 7 *Mod.* 55. Prove, also, either that these lands were formerly granted to be holden by the service of repairing this part of the highway in question, or that A. C., or those who occupied the lands before him, were always used and accustomed to repair it, from which circumstance such a grant will be presumed. The liability must exist from time out of memory; and therefore, if it appear that the tenement in respect of which the liability is charged originated within time of memory, the plea will not be supported. *R.* v. *Hayman, M. & M.* 401. Evidence of reputation is not admissible to prove the liability *ratione tenuræ. Reg.* v. *Inhabitants of Wavertree,* 2 *M. & Rob.* 353: *see R.* v. *Cotton,* 3 *Camp.* 444. Where the occupier of land is bound, *ratione tenuræ,* to repair a highway, and the land is afterwards divided among several occupiers, each occupier is liable for the repair of the whole, and he may have his remedy over against the others for contribution. *R.* v. *Buccleuch,* 1 *Salk.* 358; 2 *Saund.* 159, *n.* (9). An indictment for the non-repair of a highway in parish A., alleging the liability by reason of the tenure of lands in A., is not supported by proof of a liability to repair a way extending through A. and other parishes, by

reason of the tenure of a farm made up of lands in A. and the other parishes. *Reg.* v. *Mizen*, 2 *M. & Rob.* 382.

The record of an acquittal upon a former indictment against the parish with respect to the same piece of highway, is no evidence for the defendant; for it might have proceeded upon other grounds than the non-liability of the parish to repair. *R.* v. *St. Pancras*, *Peake*, 219. So, the record of a former conviction although conclusive against the parish upon the plea of not guilty, *Id. R.* v. *Whitney*, 7 *C. & P.* 208, unless fraud or want of notice can be shewn. 2 *Saund.* 159 *a*, *n.* (10), yet is not, it should seem, evidence against them, when they plead specially that an individual or corporation, &c., are bound to repair. But the record of a judgment after verdict against the parish, upon such a plea would, it should seem, be conclusive evidence against the parish, upon their pleading the same plea to any subsequent indictment. *See* 3 *Camp.* 444.

### *Plea that a particular Division of the Parish is bound to repair.*

And J. S. and J. N., two of the inhabitants of a certain district or township called A., in the said parish of Fryern Barnet, by A. B., their attorney, for themselves and the rest of the inhabitants of the said district or township, come into the court here, and having heard the said indictment read, say, that our lady the Queen ought not further to prosecute the said indictment, so far as respects the inhabitants of the district or township aforesaid; because they say that the said parish of Fryern Barnet is, and, from time whereof the memory of man is not to the contrary, hitherto has been divided into three districts or townships called A., B., and C.; and that the inhabitants respectively of the several districts or townships of A. and C. have, from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships, independently of each other; and that so much of the said highway in the said indictment mentioned as leads from —— to ——, lies within the said district or township of A., and so much of the said highway as leads from —— to ——, lies within the said district or township of B., and so much of the said highway as leads from —— to ——, lies within the said district or township of C.; (*see R.* v. *Inhabitants of Bridekirk*, 11 *East*, 304); and that the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken, and in great decay, lies in that part of the said parish of Fryern Barnet called the district or township of C.; and by reason of the premises aforesaid, the inhabitants of the said district or township of C. ought to repair and amend the part of the said highway last aforesaid, independently of the inhabitants of the said district or township of A., in the said parish; and this they the said J. S. and J. N. are ready to verify; wherefore, for themselves and the rest of the inhabitants of the said district or township of A., they pray judgment, and that they and the rest of the said inhabitants of the said district or township by the court here may be dismissed and discharged from the said premises in the said indictment above specified. *See* 2 *Saund.* 160, *n.* (10). *The inhabitants of B.*

*should in this case plead a similar plea, and the inhabitants of C. should (I think) plead the general issue. If the plea alleges tha the particular district has been accustomed to repair all roads within it,* which otherwise would be repairable by the parish at large, *it must shew, not only that the road in question is within the particular district, but also that it is one which, but for the custom, would be repairable by the parish. R.* v. *Eastrington,* 5 *Ad. & El.* 765; *and see R.* v. *Ecclesfield,* 1 *B. & Ald.* 348. *It is necessary that the prescription should be pleaded; for, if judgment were given against the parish, whether after verdict on the general issue, or by default, it would be conclusive evidence afterwards that the whole parish is bound to repair; R.* v. *St. Pancras, Peake,* 219: *R.* v. *Whitney,* 7 *C. & P.* 208; *unless fraud could be shewn, Ib., or unless the defence in the former case were managed by the district in which the road lay, and the other districts had no notice of the prosecution, in which case the court would give leave to the other districts to plead the prescription to the subsequent indictment. R.* v. *Townsend, Doug.* 421; 2 *Saund.* 159 *a, n.* (10); *and see* 2 *Camp.* 494. *See the precedents, C. C. C.* 392; 6 *Went.* 394, 410, 411; *and see particularly the case of R.* v. *Inhabitants of Ecclesfield,* 1 *B. & Ald.* 348; (*ante, p.* 647). *Where an indictment charged that the inhabitants of the township of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew, Auckland, were immemorially liable to repair a highway in the town of Bishop's Auckland, in the parish of St. Andrew, Auckland, and no consideration was laid for such liability; the indictment was held bad in arrest of judgment. But it was held, to be no objection that the three townships were charged conjointly. R.* v. *Bishop Auckland,* 1 *Ad. & El.* 744.

### *Replication.*

*Commencement as ante, p.* 647, *to the asterisk, and then thus:*] —that the inhabitants respectively of the several districts or townships of A. and C. have not, from time whereof the memory of man is not to the contrary, hitherto been used or accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships, independently of each other; and this he the said N. W. prays may be inquired of by the country, &c. (*See ante, p.* 86). *Or the prosecutor may traverse the fact of the part of the road out of repair being within the district of C.*

### *Evidence.*

Prove that the districts of A. and C. have been accustomed, as far as aged witnesses can recollect, each to repair the highways within its own district. Proof of a highway extinguished, as such, sixty years before, by an inclosure act, but since used by the public, and repaired by the district charged, is not sufficient to support the indictment. *Reg.* v. *Westmark,* 2 *M. & Rob.* 305. That the way is out of repair is impliedly admitted by the plea, and that the part in question lies within the district of C. is impliedly admitted by the above replication. As to the effect of a record of a former conviction or acquittal of the parish in evidence, *see ante, p.* 648.

*Indictment against an Individual for not repairing* ratione tenuræ.

*Same as the precedent ante, p. 642, to the asterisk, and then thus*]:—and that A. C., late of the parish of Fryern Barnet, in the county aforesaid, esquire, by reason of his tenure of certain lands and tenements called ——, lying and being in the said parish, ought to repair and amend that part of the highway aforesaid, so as aforesaid being ruinous, miry, deep, broken, and in decay, when and so often as there should be occasion, [as the said A. C., and all those who held the said lands and tenements for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do, and the said A. C. still of right ought to do], and that the said A. C. hath not yet done the same, &c. *See the precedents, C. C. C.* 319; 4 *Went.* 190. *Although usual, it is not necessary to allege a prescription, as in the above precedent between the crotchets.* 2 *Saund.* 158 *e, n.* (9). *If land adjoining a highway not inclosed be afterwards inclosed by the owner, (not being done by virtue of a writ of* ad quod damnum, *or other legal proceedings), he thereby renders himself liable during the continuance of the inclosure to repair that part of the highway adjoining the land so inclosed;* 2 *Saund.* 161, *n.* (12)*; and he may be indicted for allowing it to be out of repair, the indictment setting out the special matter. And these or the like considerations for the liability to repair must be stated in all cases where the indictment is against an individual, or against another parish than that in which the road is situate; stating a prescription alone will not be sufficient; except in the case of a corporation, sole or aggregate, who may be bound to repair by prescription or usage, without consideration. R.* v. *St. Giles,* 5 *M. & Sel.* 260.

*General Issue.*

And the said A. C., by A. B. his attorney, comes into court here, and having heard the said indictment read, says, that he is not guilty of the said premises in the said indictment above specified and charged upon him; and of this he puts himself upon the country, &c. (*See ante, p.* 644).

*Evidence.*

Prove the liability of A. C. to repair the part of the highway in question, *ratione tenuræ,* as directed *ante, p.* 647; if it appear that the tenement in respect of which the liability is charged, originated within time of legal memory, the defendant must be acquitted. *R.* v. *Hayman, M. & M.* 401. And prove the highway to be out of repair, as directed *ante, p.* 645.

On the other hand, the defendant, under the general issue, may prove either that the road is not out of repair, or that, instead of his being bound to repair it, the parish at large, or some district of it, by prescription or custom, or some individual *ratione tenuræ,* is bound to repair it; a special plea is not necessary in such a case. 2 *Saund.* 159, *n.* (10). However, if he plead it specially, after pleading the liability of the parish, district, or person, he must conclude with a special traverse of his own liability. *Id.* 159, *a, n.* (10).

An infant, whose guardian in socage is in possession of the property, is not such owner or occupier of the land as to be chargeable *ratione tenuræ*, for the non-repair of a bridge or highway; the guardian must be charged. *R.* v. *Sutton*, 3 *Ad. & El.* 597; 5 *Nev. & M.* 353. But it seems that infancy would not exempt, if there were no other person against whom the performance of the repairs could be enforced. *Ib.*

Where, on an indictment in the common form for not repairing a highway, alleging the defendant's liability *ratione tenuræ*, it was found by a special verdict that the defendant's land adjoined the sea; that anciently a highway went over this land, and that the defendant's predecessors had repaired it, &c.; that within living memory the sea had encroached, and that the ancient highway was covered by the sea; that the defendant's predecessors had from time to time gradually removed the ancient highway as the sea encroached, and appropriated other parts of the estate for the site of a highway, so as to keep a highway along the sea coast, and that they had always repaired such highway; that the highway mentioned in the indictment passed over a different part of the estate from that formerly occupied by any part of the ancient road; that the sea had, shortly before the finding of the indictment, made an encroachment, and washed away part of the highway alleged to be out of repair, and washed away large quantities of the earth, so that the residue of the road was too narrow for passage, and was made to stand at the edge of a precipitous bank of about seventy feet; it was held that, on these facts, the defendant was entitled to judgment. *Reg.* v. *Bamber*, 1 *Dav. & M.* 367.

*Indictment against a particular District of a Parish for not Repairing.*

*Same as the precedent, ante, p.* 642, *to the asterisk, except that, instead of saying,* "situate, lying, and being in the parish of Fryern Barnet," *you say,* "situate, lying, and being in a certain district or township called C., in the parish of Fryern Barnet, &c.; *and then thus*]:—and that the inhabitants of the said district or township of C., in the said parish of Fryern Barnet, in the county aforesaid, have, from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend that part of the highway aforesaid, so as aforesaid being ruinous, miry, deep, broken, and in decay, when and so often as there should be occasion, and that the said inhabitants of the said district or township aforesaid have not yet done the same, &c. *See the precedents,* 4 *Went.* 157, 160, 178, 184; *C. C. C.* 320; *and see* 2 *Saund.* 158 *f, n.* (9); *R.* v. *Inhabitants of Ecclesfield*, 1 *B. & Ald.* 348. *Or the liability of the township may be set out specially, as in the plea ante, p.* 648. *See R.* v. *Netherthong*, 2 *B. & Ald.* 179; *and vide infrà.*

*General Issue.*

And J. S. and J. N., two of the inhabitants of the said district or township called C., in the said parish of Fryern Barnet, by A. B., their attorney, for themselves and the rest of the inhabitants of the

said district or township, come into court here, and having heard the said indictment read, say, that they are not guilty of the said premises in the said indictment above specified and charged upon them; and of this they put themselves upon the country, &c. (*See ante, p.* 645).

*Evidence.*

Prove the liability of the township of C. to repair the part of the highway in question, by proving that the township has been used and accustomed to do so heretofore. (*See ante, p.* 649). And prove the highway to be out of repair, as directed *ante, p.* 645.

On the other hand, the defendants, under the general issue, may prove either that the road is in repair, or that, instead of their district being bound to repair it, the parish at large, or some other district in the parish, or some individual *ratione tenuræ*, is bound to repair it; a special plea is not necessary in such a case. 2 *Saund.* 159, *n.* (10). However, if it be pleaded specially, after pleading the liability of the parish, district, or person, the plea must conclude with a special traverse of the liability of the district indicted, *Id.* 159 *a, n.* (10). *See the precedent,* 4 *Went.* 161, 166; 6 *Went.* 414. If, indeed, the indictment charge the district or township with the repair of all roads within it generally, in that case a special plea would be necessary; for such a prescription makes the township, for all legal purposes, as to the repair of roads, a parish, and they must plead, &c., in the same manner as a parish would under the same circumstances. *R.* v. *Hatfield,* 4 *B. & Ald.* 75.

*Indictment for not repairing a Bridge.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that, from time whereof the memory of man is not to the contrary, there was and yet is a certain common public stone bridge, commonly called D. bridge, situate and being in the several parishes of B. and C., in the county of M. in the Queen's common highway leading from the town of H., in the county of H., towards and unto the city of London, used by and for all the liege subjects of our said lady the Queen and her predecessors, on foot, and with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride, and labour, at their free will and pleasure; and that the said bridge, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, and continually afterwards until the day of the taking of this inquisition, at the several parishes of B. and C. aforesaid, in the county aforesaid, was and yet is very ruinous, broken, dangerous, and in great decay, for want of upholding, maintaining, amending, and repairing the same, so that the liege subjects of our said lady the Queen, upon and over the said bridge, with their horses, coaches, carts, and other carriages, could not, during the time last aforesaid, nor yet can go, return, pass, repass, ride, and labour, as they before used and were accustomed to do, and still of right ought to do, without great danger of their lives, and the loss of their goods; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, upon and over the said bridge going, returning, passing, repassing, riding, and

labouring, and against the peace of our lady the Queen, her crown and dignity: And that the said bridge is not within any city or town corporate; and that it cannot be known and proved that any hundred, riding, wapentake, city, borough, or parish, or any person certain, or any body politic, ought of right to make, rebuild, repair, or amend the said bridge; and that the inhabitants of the whole county of Middlesex aforesaid ought to make, rebuild, repair, and amend the said bridge, when and so often as it should or shall be necessary; according to the form of the statute in such case made and provided. *See the precedents, C. C. C.* 313; 6 *Went.* 427. *If the bridge be within a city or town corporate, the inhabitants of such city or town corporate shall repair it; if within a riding, the inhabitants of the riding shall repair it: but, in all other cases, the inhabitants of the county at large are liable to repair it,* 22 *Hen.* 8, *c.* 5, (*and see* 2 *East*, 342; 2 *M. & Sel.* 513, 262; 1 *B. & Ad.* 289), *unless they can throw the burthen of it upon some individual, who* ratione tenuræ, *or the inhabitants of some parish or district, who by immemorial custom are bound to repair it; and immemorial usage alone is a sufficient ground for an indictment against a parish for not repairing a bridge. R.* v. *Hendon,* 4 *B. & Adol.* 628: *R.* v. *Sutton,* 3 *Ad. & E.* 595. *See the precedents,* 4 *Went.* 178, 187; *and see* 5 *Bur.* 2594; 13 *East,* 220; 1 *M. & Sel.* 435; 12 *East,* 192; 16 *East,* 223; 4 *B. & Ald.* 623; 6 *D. & R.* 231; 4 *B. & C.* 194: *and see generally Burn's J., by Chitty, tit.* "*Bridges.*" *And if part of a bridge be within one county, &c., and the other part within another county, &c., each county shall repair that part of the bridge which is within it.* 22 *H.* 8, *c.* 5, *s.* 3: *see R.* v. *Inhabitants of Penegoes and Machynlleth,* 3 *D. & R.* 383; 2 *B. & C.* 166. *Besides the bridge, the county is bound to repair* 300 *yards of the road adjoining each end of it.* 22 *H.* 8, *c.* 5, *s.* 9; *and see* 7 *East,* 583; 5 *Taunt.* 284; 14 *East,* 477; 4 *B. & Ald.* 623. *By* 43 *G.* 3, *c.* 59, *s.* 5, *no bridge thereafter to be built in any county, by or at the expense of any individual or private person, body politic, or corporate, shall be deemed a county bridge, unless erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, &c. See R.* v. *Derbyshire,* 2 *B. & Ad.* 147: *R.* v. *Lancashire,* 2 *B. & Ad.* 813: *Reg.* v. *Gloucestershire, C. & Mar.* 506. *Where a county bridge, which had been washed away, was, after the* 43 *G.* 3, *c.* 59, *built wider than before, and without notice to the county surveyor, by the parish, partly with the old materials, and in the same line of passage over the river, it was held that this was not a new bridge within the meaning of the act, and that the county was still liable to repair it. R.* v. *Devon,* 5 *B. & Ad.* 383; 2 *Nev. & M.* 212: *see Reg.* v. *Inhabitants of Addenbury East,* 1 *Dav. & M.* 324. *The county are not compellable to widen a bridge. R.* v. *Devon,* 4 *B. & C.* 670; 7 *D. & R.* 147.

*As to what is a bridge, and what a culvert, and so part of the highway, see R.* v. *Oxfordshire,* 1 *B. & Ad.* 289: *R.* v. *Whitney,* 7 *C. & P.* 208; *Reg.* v. *Derbyshire,* 2 *G. & D.* 97.

*The pleas and evidence are the same,* mutatis mutandis, *with the pleas and evidence in the case of an indictment for not repairing a highway.* (*See ante, p.* 644 *et seq.*) *Upon an indictment against a private person or corporate body for not repairing, inhabitants of the county, &c., are competent witnesses for the prosecution.* 1 *Anne, st.* 1, *c.* 18, *s.* 13. (*See ante, p.* 145).

*The costs of a frivolous defence to an indictment for non-repair of a county bridge, though they cannot be given under the 5 & 6 W. 4, c. 50, (which does not apply to county bridges, see s. 5), may be obtained, on the certificate of the judge that the defence was frivolous, under the* 13 *G.* 3, *c.* 78, *s.* 64, *which is incorporated into the* 43 *G.* 3, *c.* 58, *s.* 1, *and for this purpose not repealed by the* 5 & 6 *W.* 4, *c.* 50. *Reg.* v. *Merionethshire, Q. B., Trin. Vac.*, 1844.

*See a precedent of an indictment for not repairing a county gaol, C. C. C.* 318.

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*Other Cases of Nuisance.*

1. By stat 10 & 11 *W.* 3, *c.* 17, all lotteries are declared to be public nuisances, (unless specially sanctioned by act of parliament). 2. Stage-plays unlicensed, booths and stages for rope-dancers, mountebanks, and the like, are also public nuisances. 4 *Bl. Com.* 167, 168. 3. The making and selling of fireworks and squibs, or throwing them about in the street, is declared to be a common nuisance by stat. 9 & 10 *W.* 3, *c.* 7. 4. A common scold is deemed a public nuisance. 4 *Bl. Com.* 109.

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## Sect. 3.

### FURIOUS DRIVING.

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*Statute.*

1 *G.* 4, *c.* 4]—*Recites* 50 *G.* 3, *c.* 48, and enacts, that if any person whatever shall be maimed or otherwise injured by reason of the wanton or furious driving or racing, or by the wilful misconduct of any coachman or other person having the charge of any stage coach or public carriage; such wanton and furious driving or racing, or wilful misconduct of such coachman or other person, shall be, and the same is hereby declared to be a misdemeanor, and punishable as such by fine and imprisonment. Provided always that nothing in this act shall extend, or be construed to extend, to hackney coaches being drawn by two horses only, and not plying for hire as stage coaches.

*Indictment.*

*Commencement as ante, p.* 633]—in the county aforesaid, being then and there a coachman, and having charge of a certain public carriage called an omnibus ("*any stage coach or public carriage*") carrying passengers for hire, the same not being a hackney coach, did then and there wantonly and furiously drive the same, and by reason of such wanton and furious driving of the same, the same public carriage was then and there overturned, and one J. N., who was then and there a passenger in and by the said public carriage, was thereby then and there greatly wounded, lamed, and injured, to the great damage of the said J. N., against the form of the statute in such case

made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, fine and imprisonment.* 1 *G.* 4, *c.* 4.

*Evidence.*

Prove that the defendant was coachman of the carriage as stated in the indictment; prove the furious driving, and the accident in consequence; and prove the injury to J. N., which must be a personal injury.

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## Sect. 4.

### OPEN AND NOTORIOUS LEWDNESS.

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*Indictment against a Man for publicly exposing his Naked Person.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, being a scandalous and evil-disposed person, and devising, contriving, and intending the morals of divers liege subjects of our lady the Queen to debauch and corrupt, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, on a certain public and common highway there situate, in the presence of divers liege subjects of our said lady the Queen then and there being, and within sight and view of divers other liege subjects through and on the said highway then and there passing and repassing, unlawfully, wickedly, and scandalously did expose to the view of the said persons so present, and so passing and repassing as aforesaid, the body and person of him the said J. S. naked and uncovered, for a long space of time, to wit, for the space of one hour; to the great scandal of the said liege subjects of our said lady the Queen, to the manifest corruption of their morals, in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Fine or imprisonment, or both. See R.* v. *Sir Charles Sedley,* 10 *St. Tr. Ap.* 93; 1 *Sid.* 168; 1 *Keb.* 620; *and see R.* v. *Gallard,* 1 *Sess. Ca.* 231: *R.* v. *Crunden,* 2 *Camp.* 89; 1 *B. & Adol.* 933: *Reg.* v. *Rowed,* 3 *Q.B.* 180; 2 *G. & D.* 518; (*ante, p.* 487). *Prove the offence as laid; the time is not material.*

*As to selling obscene prints or books, see ante, p.* 534; *and as to keeping a bawdy-house, see ante, p.* 635.

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SECT. 5.

GAMING.

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*Statutes.*

9 *Anne*, *c.* 14, *s.* 5]—Enacts, that if any person or persons whatsoever, at any time or times after the said first day of May, 1711, do or shall, by any fraud or shift, cosenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid (*i. e.* cards, dice, tables, or other games whatever), or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall, at any one time or sitting, win of any one or more person or persons whatsoever, above the sum or value of ten pounds, that then every person or persons so winning by such ill practices as aforesaid, or winning at any one time or sitting, above the said sum or value of ten pounds, and being convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing, so won as aforesaid; and in case of such ill practice as aforesaid, shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; and such penalty to be recovered by such person or persons as shall sue for the same by such action as aforesaid.

18 *G.* 2, *c.* 34, *s.* 1]—Enacts, that if any person, after the commencement of this act, shall win or lose at play, or by betting, at any one time, the sum or value of ten pounds, or within the space of twenty-four hours, the sum or value of twenty pounds, such person shall be liable to be indicted for such offence within six months after it is committed, either before his Majesty's justices of the King's bench, assize, gaol delivery, or grand sessions; and being thereof legally convicted, shall be fined five times the value of the sum so won or lost; which fine (after such charges as the court shall judge reasonable allowed to the prosecutors and evidence out of the same) shall go to the poor of the parish or place where such offence shall be committed.

8 & 9 *Vict.* *c.* 109, *s.* 2—*Evidence of House being common Gaming-house*]—Enacts, that in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law, and forbidden to be kept by the said act of King Henry VIII (33 *H.* 8,

c. 9), and by all other acts containing any provision against unlawful games or gaming-houses.

Sect. 5]—Enacts, that it shall not be necessary in support of any information for gaming in, or suffering any games or gaming in, or for keeping or using, or being concerned in the management or conduct of, a common gaming-house, to prove that any person found playing at any game was playing for any money, wager, or stake.

Sect. 17]—*Cheating at play punishable as obtaining Money by false Pretences.*]—Enacts, that every person who shall by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly.

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### *Indictment for Winning Money at Cards, &c., by Fraud.*

Middlesex, to wit:—The jurors of our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, by fraud, shift, cosenage, circumvention, deceit, unlawful device, and ill practice, in playing at and with cards, to wit, at a certain game of cards called *Rouge et noir*, with one J. N., unlawfully did win, obtain, and acquire to himself a large sum of money, to wit, the sum of sixty pounds, of the monies of the said J. N., [*or* certain valuable things to wit, one —— of the value of ——, and one —— of the value of ——, of the goods and chattels of the said J. N., *or* being the property of the said J. N.]; to the great damage of the said J. N., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*The defendant shall forfeit five times the value of the money or other thing won, shall be deemed infamous, and shall suffer corporal punishment, as in the case of perjury.* 9 *Anne*, c. 14, s. 5. *As to the penalty, however, it is not included in the judgment, but an action must afterwards be brought to recover it.* *R.* v. *Lookup*, 2 *Str.* 1048. *This section of the statute extends to "cards, dice, tables, tennis, bowls, and other game or games whatsoever;" it extends not only to the winner, but also to persons "bearing a share or part in the stakes, wagers, or adventures," or "betting on the sides or hands of such as do play as aforesaid." See the precedents*, 6 *Went.* 383, 391. *If it be doubtful at what game they played, add a count omitting the name of the game.*

*The defendant may also be punished as for obtaining money by false pretences.* (*See ante, p.* 290); 8 & 9 *Vict.* c. 109, s. 17.

### *Evidence.*

To maintain this indictment, it is necessary not only to prove that

J. S. won of J. N. the money, &c., laid in the indictment, or some part of it, *see R.* v. *Darnley*, 1 *Stark. R.* 359, but also to prove that it was won by "fraud, shift, cosenage, circumvention, deceit, unlawful device, or ill practice." *See R.* v. *Rogier*, 2 *D. & R.* 431; 1 *B. & C.* 272, (*ante, p.* 638). A variance between the indictment and evidence, as to the game played (if stated), would be fatal.

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*Indictment for Winning more than Ten Pounds at one Sitting.*

*Commencement as in the last Precedent*]—in the county aforesaid, by playing at and with cards, to wit, at a certain game at cards called *Rouge et noir*, with one J. N., unlawfully did win of the said J. N., at one time and sitting, above the sum and value of ten pounds, that is to say, the sum of sixty pounds, of the monies of the said J. N., to the great damage of the said J. N., &c. &c., *as in the last precedent.*

*The defendant shall forfeit five times the value of the money or other thing won.* 9 *Anne, c.* 14, *s.* 5, (*ante, p.* 656). *Upon this statute, however, the judgment was merely* quod convictus est, *and an action must afterwards have been brought for the penalty; R.* v. *Lookup*, 2 *Str.* 1048; *but, by* 18 *G.* 2, *c.* 34, *s.* 8, *the court shall set the fine of five times the value, &c. which fine, after deducting from it such charges as the court shall deem reasonable to be allowed to the prosecutor, and for evidence, shall go to the poor of the parish or place where the offence was committed.*

*Evidence.*

All the prosecutor has to prove is, that J. S. won of J. N., at one sitting, a sum exceeding ten pounds, at the game specified in the indictment. Where two persons played at cards from Monday evening to Tuesday evening, without intermission, except an hour or two at dinner, &c., it was holden to be one sitting, within the meaning of the above statutes. *Bones* v. *Booth*, 2 *W. Bl.* 1226.

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## Sect. 6.

### OFFENCES RELATING TO GAME.

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*Statute.*

9 *G.* 4, *c.* 69, *s.* 4—*Limitation of Proceedings*]—Enacts, that the prosecution for every offence punishable upon summary conviction, by virtue of this act, shall be commenced within six calendar months after the commission of the offence; and the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this act, shall be commenced within twelve calendar months after the commission of such offence.

Sect. 8—*Conviction—Evidence*]—Enacts, that on every conviction under this act for the first or second offence, the convicting justices

shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence; and the clerk of the peace shall immediately on such return make, or cause to be made, a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party.

Sect. 12—*What Night*]—Provides and enacts, that for the purposes of this act, the night shall be considered and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.

Sect. 13—*What Game*]—Enacts, that for the purpose of this act, the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

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## TAKING GAME AFTER TWO PREVIOUS CONVICTIONS.

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### *Statute.*

9 *G.* 4, *c.* 69, *s.* 1.]—Whereas an act was passed in the fifty-seventh year of the reign of his late Majesty King George the Third, intituled "*An Act for Prevention of Persons going armed by Night for the destruction of Game; and for repealing an Act made in the last Session of Parliament, relative to Rogues and Vagabonds;*" and whereas the practice of going out by night, for the purpose of destroying game, has nevertheless very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences; and it is expedient to repeal the said recited act, and to make more effectual provisions than now by law exist for repressing such practice; be it enacted that the said recited act shall be and the same is hereby repealed, except so far as the same repeals any other acts; and if any person shall, after the passing of this act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance, or in Scotland by bond of caution, himself in ten pounds, and two sureties of five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to

hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case.

*7 & 8 Vict. c. 29, s. 1*]—*Recites the 9 G. 4, c. 69, s. 1, and that the provisions of that act have been evaded and defeated by the destruction, by armed persons at night, of game or rabbits, not upon open or inclosed lands, as described in the said act, but upon public roads and highways, and other roads and paths leading through such lands, and also at the gates, outlets, and openings between such lands and roads, highways, and paths, so that not only has the destruction of game and rabbits not been prevented, but the risk of murder and other grievous offences contemplated by the said act has been increased, &c.: and* enacts, that from and after the passing of this act, all the pains, punishments, and forfeitures imposed by the said act upon persons by night unlawfully taking or destroying any game or rabbits in any land open or inclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path in the like manner as upon any land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorized by the said act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said act or this act; and the said act, and all the powers, provisions, authorities, and jurisdictions, therein or thereby contained or given, shall be as applicable for carrying this act into execution, as if the same had been herein specially set forth.

### *Indictment.*

*Commencement as ante, p. 208, stating the two former Convictions*]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish of B., in the

county of M., labourer, afterwards, and after he had been so twice convicted as aforesaid, and within twelve calendar months now last past, to wit, on the third day of August, in the year last aforesaid, about the hour of eleven in the night of the same day, at the parish of B., in the said county of M., did by night unlawfully take and destroy certain game and rabbits, to wit, one pheasant and two rabbits, in certain land ("*any land whether open or inclosed*") in the occupation of J. N., there situate, [*or*, unlawfully enter certain land in the occupation of J. N., there situate, and was then and there by night unlawfully in the said land with a certain gun, ("*gun, net, engine, or other instrument*"), for the purpose then and there, by night as aforesaid, of taking or destroying game]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the offence was committed on any public road, highway, or path, or the sides thereof, or at any opening, outlet, or gate from any land into any such road, &c., state it accordingly.* 7 & 8 *Vict. c.* 29, *s.* 1.

*Misdemeanor, transportation for seven years, or imprisonment and hard labour not exceeding two years.* 9 *G.* 4, *c.* 69, *s.* 1.

*Evidence.*

Prove the two former convictions by the production of the originals, or by examined copies. (*See ante, p.* 127; *and* 9 *G.* 4, *c.* 69, *s.* 8, *ante, p.* 658). Prove the identity of the defendant. And prove the third offence, as stated in the indictment. It must have been committed in the night time, that is, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise; 9 *G.* 4, *c.* 69, *s.* 12; but a variance between the hour stated and that proved will not be material. It must also appear that the offence was committed within twelve calendar months before the prosecution. *See the evidence under the next precedent.*

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THREE OR MORE ENTERING LAND IN THE NIGHT, TO TAKE GAME, ARMED.

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*Statute.*

9 *G.* 4, *c.* 69, *s.* 9]—*Three Persons armed taking Game, &c.*]—Enacts, that if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and, being convicted thereof before the justices of gaol delivery, or of the court of great sessions, of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned and kept to hard labour for any

term not exceeding three years; and in Scotland any person so offending shall be liable to be punished in like manner.

7 & 8 *Vict. c.* 29, *s.* 1.—(*Ante, p.* 660).

*Indictment.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, and W. S., late of the same place, labourer, together with divers other persons, to the number of three and more, to the jurors aforesaid unknown, on the third day of November, in the ninth year of the reign of our sovereign lady Victoria, at the parish aforesaid, in the county aforesaid, about the hour of eleven in the night of the same day, being then and there respectively armed with guns and other offensive weapons, ("*any gun, cross-bow, fire-arms, bludgeon, or other offensive weapon*"), did then and there together, by night as aforesaid, and armed as aforesaid, unlawfully enter, ("*enter or be*") into certain land, ("*any land, whether open or inclosed*"), in the occupation of J. N., there situate, and were then and there by night as aforesaid, and armed as aforesaid, together unlawfully in the said land, for the purpose then and there of taking and destroying game; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *This offence is of a local nature, and the indictment must describe the close, &c., by name or occupation. R.* v. *Riddley, R. & R.* 515. *It is not, however, necessary to state both the name and the occupation of the close; but if both be stated, both must be proved, and a variance will be fatal. R.* v. *Owen,* 1 *Mood. C. C.* 118. *A certain cover in the parish of A. is too general a description. R.* v. *Crick,* 5 *C. & P.* 508. *The indictment need not specify whether the land was open or inclosed. R.* v. *Andrews,* 2 *M. & Rob.* 37. *The indictment must shew that the entry and the arming were by night; where, therefore, an indictment stated that the defendants, on &c., did by night enter divers closes, and were then and there in the said closes armed, &c., the judgment was arrested, because the word "night" was confined to the first branch of the sentence, and the words "then and there" referred only to the day and place before stated. R.* v. *Davies,* 10 *B. & C.* 89. *It has been held that the indictment is sufficient, without a distinct averment, in the earlier part of it, that the defendants being armed did together unlawfully, &c., enter, &c. R.* v. *Kendrick,* 7 *C. & P.* 184. *But in a subsequent case, R.* v. *Wilks, Id.* 812, *Parke, B., intimated that it would be advisable to introduce such an averment in future; and the above indictment has been framed in compliance with this suggestion. To this may be added a count for assaulting a game-keeper,* (*ante, p.* 466): *and see* R. v. *Handley,* 5 *C. & P.* 565.

*Misdemeanor, transportation not exceeding fourteen nor less than seven years, or imprisonment and hard labour not exceeding three years.* 9 *G.* 4, *c.* 69, *s.* 9. *The justices at sessions have no jurisdiction of this offence. Id.*

*Evidence.*

Prove that the defendants, with others, to the number of three or more, entered and were, in the night time, (that is to say, some time between the expiration of the first hour after sunset, and the beginning

of the last hour before sunrise, 9 *G.* 4, *c.* 96, *s.* 12, (*ante, p.* 659)), in certain land in the occupation of J. N., and situate as described in the indictment. A variance in the local situation, occupation, or the name of the close, if it be stated, will be fatal. *R.* v. *Owen*, 1 *Mood. C. C.* 118. All the defendants should be proved to have been at the place in question. Where the indictment charged that the prisoners were with others on Redborough-hill brake, and one only was seen there, the others being in a wood separated therefrom by a high road, *Patteson*, J., held the indictment not proved, as all must be proved to have been in the place mentioned. *R.* v. *Dowsel*, 6 *C. & P.* 398.

Prove that they entered the land for the purpose of taking and destroying game, (that is, hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards, 9 *G.* 4, *c.* 69, *s.* 13, (*ante, p.* 668)), or rabbits there. Upon an indictment on the repealed stat. 57 *G.* 3, *c.* 90, for having entered a close, &c., with intent then and there illegally to destroy game, &c., the jury found that the defendant was in pursuit of game, but could not say whether in the close mentioned in the indictment or not; and the defendant having been convicted, the judges held the conviction wrong, because the entry with intent to kill was confined by the indictment to the close specified, and it was therefore necessary to prove the intent as to that close. *R.* v. *Barham*, 1 *Mood. C. C.* 151: *R.* v. *Capewell*, 5 *C. & P.* 549: *R.* v. *Gainer*, 7 *C. & P.* 231. The intent is proved by circumstances from which the jury may infer it, as that the land was a preserve for game, or that the defendants discharged guns there, or that they actually took game or rabbits there, which is the best possible evidence of the intent. All who are at the place, each acting his part, with the common intent of taking game in the land mentioned in the indictment, are equally guilty, though some of them only are bodily on the land; if, therefore, some be watching on the outside of a preserve to give an alarm if necessary, they may equally be convicted with those who actually enter the preserve. *R.* v. *Passey*, 7 *C. & P.* 282: *R.* v. *Lockett*, *Id.* 300: *R.* v. *Andrews*, 2 *M. & Rob.* 37. *Sed quære; see Reg.* v. *Scotton*, 5 *Q. B.* 493. *See now the* 7 *&* 8 *Vict. c.* 29, *s.* 1, (*ante, p.* 660). But not if, some of them being on the land in question, another is poaching independently of them on adjoining land. *Reg.* v. *Nickless*, 8 *C. & P.* 737. The sending in of a dog to drive hares into a net set in the fence, is not an entering of the land within the statute. *Ib.*

Prove that the defendants, or some or one of them, were armed with a gun or other offensive weapon, as stated in the indictment. (*See ante, p.* 633). A stick or bludgeon is not an offensive weapon, unless the jury find that the defendant took it with him for the purpose of offence. *R.* v. *Palmer*, 1 *M. & Rob.* 70: *R.* v. *Fry*, 2 *M. & Rob.* 42. Large stones are offensive weapons, if the jury are satisfied that they were of a description capable of inflicting serious injury if used offensively, and that they were brought and used by the defendants for that purpose. *R.* v. *Grice*, 7 *C. & P.* 803. The words of the statute are, "*any* of such persons being armed," &c. If one of the party be armed, with the knowledge of the rest, it will support the allegation that they were all armed; *R.* v. *Smith*, *R. & R.* 368: *Reg.* v. *Goodfellow*, 1 *C. & K.* 724: and it is not necessary that any of the party should be actually armed at the moment they are discovered, if there be evidence to satisfy the jury that they were armed on the

land. Upon an indictment on the repealed statute, for being *found* armed, it appeared that the flash of the gun was seen in a wood, but, before the defendants were discovered, they had abandoned their arms, and were found creeping away upon their knees; the judges held that they were armed within the meaning of that statute. *R.* v. *Nash, R. & R.* 386. It would be within the words of this statute, if one of the party was armed without the knowledge of his companions, but the contrary was decided upon the repealed statute; *R.* v. *Southern, R. & R.* 444; and it may be doubtful how far such a case would come within the intention of the legislature in this particular act. Where the indictment charged that the defendants, A. & B., together with another person, entered certain land, "the said A. & B. then and there being armed," it was held that this allegation was not supported by proof that the third person was armed, and that A. & B. were not so. *Reg.* v. *Davis*, 8 *C. & P.* 759: *but see Reg.* v. *Goodfellow*, 1 *C. & K.* 724.

Lastly, it must be proved that the offence was committed within twelve calendar months next before the prosecution. 9 *G.* 4, *c.* 69, *s.* 4, (*ante, p.* 658). *See R.* v. *Killminster*, 7 *C. & P.* 228: *Reg.* v. *Austin*, 1 *C. & K.* 621; (*ante, p.* 61).

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## SECT. 7.

### SETTING SPRING GUNS, &c.

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### *Statute.*

7 & 8 *G.* 4, *c.* 18, *s.* 1.]—Whereas it is expedient to prohibit the setting of spring-guns and man-traps, and other engines calculated to destroy human life, or inflict grievous bodily harm: be it therefore enacted, that, from and after the passing of this act, if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith; the person so setting or placing, or causing to be set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor.

Sect. 2]—Provides, that nothing herein contained shall extend to make it illegal to set any gin or trap such as may have been or may be usually set with the intent of destroying vermin.

Sect. 3]—Enacts and declares, that if any person shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine as aforesaid, which may have been set, fixed, or left in any place then being in or afterwards coming into his or her possession or occupation by some other person or persons, so continue so set or fixed; the person so permitting the same to continue shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid.

Sect. 4]—Provides and enacts, that nothing in this act shall be

deemed or construed to make it a misdemeanor, within the meaning of this act, to set or cause to be set, or to be continued set, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or caused or continued to be set in a dwelling-house for the protection thereof.

*Indictment.*

*Commencement as ante, p.* 662]—in the county aforesaid, did unlawfully set and place, and did cause to be set and placed, in a certain garden there situate, a certain spring-gun, which was then and there loaded and charged with gunpowder and divers leaden shot, with intent then and there that the said spring-gun, so loaded and charged as aforesaid, should inflict grievous bodily harm upon any trespasser who might come in contact therewith; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, fine or imprisonment, or both.* 7 *&* 8 *G.* 4, *c.* 18.

*Evidence.*

Prove that the defendant placed or continued (*see* 7 *&* 8 *G.* 4, *c.* 18, *s.* 3, *supra*) the spring-gun loaded in a place where persons might come in contact with it; and if any injury was in reality occasioned, state it in the indictment, and prove it as laid.

The intent can only be inferred from circumstances; (*see ante, p.* 104); as the position of the gun, the declarations of the defendant, and so forth. Any injury actually done will be strong evidence of the intent.

This statute applies only to instruments set with an *intention* to do grievous bodily harm thereby to human beings, or whereby grievous bodily harm is actually done to a human being; not, therefore, to *dog-spears* set by a man in his own land. *Jordin* v. *Crump*, 8 *M. & W.* 782.

## Sect. 8.

### TAKING UP DEAD BODIES.

*Indictment for digging up and carrying away a Dead Body.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B. in the county of M., labourer, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, the churchyard of and belonging to the parish church of the said parish, there situate, unlawfully and wilfully did break and enter, and the grave there in which one J. N., deceased, had lately before then been interred, and then was, with force and arms, unlawfully, wilfully, and indecently did dig open, and then and there the body of him the said J. N. out of the grave aforesaid, unlawfully, wilfully, and indecently did take and carry away: in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, fine or imprisonment, or both. R.* v. *Lynn*, 2 *T. R.* 733: *R.* v. *Giles, R. & R.* 366, *n.*: *R.* v. *Cundick, D. & R. N. P.* 13.

*If the body cannot be recognized, state it to be the body of a person to the jurors aforesaid unknown; and if it be doubtful from what place the body was taken, see R. & R. 366, n.*

*See 2 & 3 W. 4, c. 75, the act for regulating the schools of anatomy.*

### *Evidence.*

Prove that the defendant dug up the body; and the slightest removal of it would, it seems, be sufficient to constitute the offence. Or, prove that the body was found in the defendant's possession, and that it had been previously interred in the churchyard mentioned in the indictment; from which the jury may fairly presume that the defendant was the person who dug it up or removed it.

## SECT. 9.

## DISTURBING PUBLIC WORSHIP.

### *Statute.*

52 *G.* 3, *c.* 155, *s.* 12]—Enacts, that if any person or persons, at any time after the passing of this act, do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorised by this act, or any former act or acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties, to be bound by recognisances in the penal sum of fifty pounds, to answer for such offence, and, in default of such sureties, shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of forty pounds.

### *Indictment for disturbing a Congregation of Baptists during Divine Service.*

Westmoreland, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the general quarter sessions of the peace holden at Appleby, in and for the county of Westmoreland, on the —— day of ——, in the first year of the reign of our sovereign lady Victoria, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, before A. B. and C. D., esquires, and others their associates, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, J. N., clerk, teacher, and preacher to a congregation of Protestants dissenting from the Church of England, scrupling infant baptism, did then and there, pursuant to the statute in such case

made and provided, certify to his Majesty's justices of the peace assembled in quarter sessions aforesaid, that he had appointed a certain house situate at ——, in the parish of B., in the county aforesaid, therein to assemble and meet for religious worship, and which was then and there duly registered and recorded, according to the directions of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the third day of August, in the fourth year of the reign of our sovereign lady Victoria, a congregation of Protestants, dissenting from the Church of England, of which the said J. N. was then the teacher and preacher, were assembled for the public worship and service of Almighty God in the house aforesaid, so certified, registered, and recorded as aforesaid; and that J. S., late of the parish aforesaid, in the county aforesaid, labourer, J. W., late of the same, carpenter, and E. W., late of the same, labourer, afterwards, to wit, on the day and year last aforesaid, whilst the said congregation were so assembled as aforesaid, and during divine service at the parish aforesaid, in the county aforesaid, unlawfully, willingly, and of purpose, maliciously and contemptuously did come into the said congregation, during divine service as aforesaid, and did then and there willingly, and of purpose, maliciously and contemptuously disquiet and disturb the congregation, [by then and there talking, cursing, and swearing, with a loud voice, and also by talking with a loud voice to the said J. N., he the said J. N. then and there being in the pulpit], the doors of the said meeting-house and place where the said congregation were so assembled as aforesaid not being then locked, barred, or bolted; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W., and E. W., afterwards, to wit, on the day and year last aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, did willingly and of purpose, maliciously and contemptuously come into a certain congregation of Protestants dissenting from the Church of England, then and there assembled for the worship and service of Almighty God, in a certain meeting-house there situate, and the said congregation then and there wilfully, willingly, and of purpose, maliciously and contemptuously did disquiet and disturb, [by talking, laughing, swearing, and cursing with a loud voice], (the said meeting-house, where the said congregation were so assembled as aforesaid, being then and long before certified, registered, and recorded, according to the direction of the statute in such case made and provided, and the doors of the said meeting-house and place where the said congregation were so assembled not being then locked, barred, or bolted); and against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *See R.* v. *Cheere*, 4 *B. & C.* 902; 6 *D. & Ry.* 461.

*Fine* 40*l.* (52 *G.* 3, *c.* 155, *s.* 12), *each defendant. R.* v. *Hube*, 5 *T. R.* 542. *See the like provision as to catholic chapels*, 31 *G.* 3, *c.* 33, *s.* 10. *This offence may be tried at the sessions*, 52 *G.* 3, *c.* 155, *s.* 12, *or in the King's Bench*, *R.* v. *Wroughton*, 3 *Bur.* 1683, *or at the assizes, if removed from the sessions by certiorari.* 5 *T. R.* 342; 4 *M. & Sel.* 508.

*Evidence.*

1. Prove that the chapel or meeting-house was certified and registered, as alleged in the indictment; which may be done by the clerk of the peace producing the book, &c., in which the same was registered, or perhaps by an examined copy of the entry. (*See ante, p.* 317). Where it was objected that the statute did not extend to a congregation of foreign Lutherans, though registered, the objection was overruled. *R.* v. *Hube, Peake,* 132. It is immaterial whether the officiating clergyman have qualified according to the statute or not. *Ib.*

2. Prove the disturbance, as stated in the indictment. Where, in a contest for the situation of a clerk to a meeting-house, one clerk pulled the other from the desk, it was holden to be a disturbance within the statute, *R.* v. *Hube,* 5 *T. R.* 542, although the statute was certainly intended principally to apply to persons who with violence oppose a form of worship inconsistent with their own ideas and tenets.

## Sect. 10.

### REFUSING TO EXECUTE A PUBLIC OFFICE.

*Indictment for refusing to serve the Office of Chief Constable.*

Middlesex to wit:—The jurors for our lady the Queen upon their oath present, that, at the general quarter sessions of the peace, holden at the New Sessions House on Clerkenwell Green, in and for the county of Middlesex, on ——, the —— day of ——, in the ninth year of the reign of our sovereign lady Victoria, to wit, at the parish of ——, in the county aforesaid, before A. B. and C. D., esquires, and others their associates, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, one J. S., late of the parish of B., in the county of M., shoemaker, then and long before being an inhabitant and residing in the parish last aforesaid, within the hundred of Ossulston in the said county, and a fit and able person to execute the office of chief constable within the said hundred, at the said sessions, by the justices aforesaid, in due manner was then and there elected to be one of the chief constables of the hundred aforesaid, in the room and stead of one J. N., whereof the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish last aforesaid, in the county aforesaid, had notice. Nevertheless, the said J. S. not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, obstinately, and contemptuously did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth

refuse, to take upon himself and execute the said office of chief constable, within the hundred aforesaid, to wit, at the parish last aforesaid, in the county aforesaid; contrary to his duty in that behalf, in manifest contempt and delay of justice, and against the peace of our lady the Queen, her crown and dignity. *The indictment must shew by whom the defendant was elected, and that he had notice. R.* v. *Harper*, 5 *Mod.* 96.

*Fine or imprisonment, or both. See R.* v. *Bower*, 1 *B. & C.* 587; 2 *D. & R.* 842.

### *Evidence.*

1. Prove the election, by subpœnaing the clerk of the peace to produce the minutes of it. 2. Prove the service of a notice upon the defendant, informing him of his election, and requiring him to attend before the justices to be sworn. 3. And prove either an actual refusal to serve the office; or that he did not attend to be sworn in, which would be *primâ facie* evidence of a refusal.

On the other hand, the defendant, as a defence, may prove: 1. That he is not an inhabitant resiant of the place for which he is chosen. *R.* v. *Adlard*, 7 *D. & R.* 340; 4 *B. & C.* 772: *Donne* v. *Martyr*, 2 *M. & R.* 91; 8 *B. & C.* 62; 1 *Burn's J., by Chitty, tit.* "*Constable*," *s.* 2.—2. That he is president or one of the commons or fellows of the faculty of physic in London. 32 *H.* 8, *c.* 40.—3. That he is a surgeon, duly admitted, and practising in London, *semb. See* 5 *H.* 8, *c.* 16; 18 *G.* 2, *c.* 15: *R.* v. *Pond*, *Comyns*, 312.—4. That he is an apothecary, free of the company of apothecaries in London, or (if he reside in the country) having served seven years' apprenticeship. 6 & 7 *W.* 3, *c.* 4.—5. That he is a practising barrister or attorney. *Semble*, 2 *Hawk. c.* 10. *s.* 39.—6. That he is an alderman of London. 2 *Hawk. c.* 10, *s.* 40.—7. That he is a serjeant, corporal, or private man serving in the militia. 26 *G.* 3, *c.* 127, *s.* 139.—8. That he is a protestant dissenting minister, and has taken the oaths, &c., 1 *W. & M. c.* 18, *s.* 11, and does not follow any trade, occupation, &c., for his livelihood, excepting that of a schoolmaster. 52 *G.* 3, *c.* 155, *s.* 9.—9. That he is a catholic clergyman, and has taken the oaths prescribed. 31 *G.* 3, *c.* 32, *s.* 8.—10. That he is a foreigner. *R.* v. *Mierre*, 5 *Burr.* 2787.—11. That he has a special exemption from the crown, from serving in parish offices, &c. *R.* v. *Clark*, 1 *T. R.* 679.

But it is no answer to say that he is a Protestant dissenter or Catholic; for he may serve by deputy, if he do not wish to take the oaths. 1 *W. & M. c.* 18, *s.* 7; 31 *G.* 3, *c.* 32, *s.* 7. Nor is it any defence that he is an officer of the King's guards, 2 *Hawk. c.* 10, *s.* 41, or a younger brother of the Trinity House, 1 *T. R.* 679, for the same reason. Nor is it any defence that he resides in the jurisdiction of a leet within the hundred or place for which he is elected; *R.* v. *Genge*, *Cowp.* 13; or that no constable had ever before been appointed for the place. 2 *Keb.* 557.

### *Indictment for refusing to serve the Office of Petty Constable.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of

M., shoemaker, on the —— day of ——, in the ninth year of the reign of our sovereign lady Victoria, and long before, was and still is an able-bodied man, resident within the parish aforesaid, between the ages of 25 years and 55 years, in the county aforesaid, and duly qualified to execute the office of constable for the said parish; and that the said J. S., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, at a special petty session of the peace of the justices of the peace of the said county, duly holden for the appointment of constables for the said parish, was lawfully and in due manner and form chosen, nominated, and appointed by the said justices to be one of the constables of and for the said parish, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; and that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, had due notice thereof, and then and there was summoned and required to appear before the said justices on the fifth day of August in the year aforesaid, then and there to take his oath for the due execution of the said office of constable for the said parish, according to the duty of that office, and to take upon himself the said office. Nevertheless, the said J. S., not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, obstinately, and contemptuously did refuse, and from thence continually until the day of the taking this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take his said oath for the due execution of the said office of constable, or in anywise to take upon himself and execute the said office; contrary to his duty in that behalf, in manifest contempt and delay of justice, and against the peace of our lady the Queen, her crown and dignity. (*See a similar precedent where the defendant was elected at the leet, Burn's J., by Chitty, tit.* "*Constable,*" *C. C. C.* 125; 4 *Went.* 351, 332; *and the like where the election was at a court of wardmote for one of the wards in the city of London, C. C. C.* 147).

*The appointment, duties, and powers of parish constables are now regulated by the stat.* 5 & 6 *Vict. c.* 109, *the* 21*st section of which prohibits their future appointment* (*except for the performance of duties unconnected with the preservation of the peace*) *at any court leet or torn, or otherwise than under the provisions of that act, or of the County Constables Act,* 2 & 3 *Vict. c.* 93. *As to the grounds of exemption, see s.* 6.

*As to the evidence, see ante, p.* 669.

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### *Indictment for refusing to serve the Office of Overseer of the Poor.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., shoemaker, on the —— day of ——, in the ninth year of the reign of our sovereign lady Victoria, and long before, was and still is a substantial householder in the parish aforesaid, in the county aforesaid, and an inhabitant and resiant in the parish, and a fit and

able person to execute the office of overseer of the poor for the said parish; and that the said J. S. on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, by warrant under the hands and seals of A. C., esquire, and J. P., clerk, two of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, (one of the said justices being of the quorum, and both of the said justices then dwelling in [*or* near] the parish aforesaid in the county aforesaid), was lawfully nominated and appointed to be one of the overseers of the poor of the said parish, according to the direction of the statute in such case made and provided; whereof the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, had notice. Nevertheless, the said J. S. not regarding his duty in that behalf, but contriving and intending to render the said warrant of appointment of no effect, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, obstinately, and contemptuously did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take upon himself and execute the said office of overseer of the poor of the said parish, to wit, at the parish aforesaid, in the county aforesaid; contrary to his duty in that behalf, to the great damage of the said parish, and the parishioners thereof, in delay of the provision for and care of the poor of the said parish, in contempt of our lady the Queen and her laws, to the evil example of all others in like case offending, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*See the precedents*, 4 *Went.* 338, 439). *In stating the appointment, let the terms of the warrant be particularly attended to.*

*Evidence.*

Produce the warrant, and prove it. Prove that the defendant had notice of it, as mentioned in the indictment. And prove either that he had actually refused to execute the office, or that he did not afterwards execute it, from which his refusal to execute it will be implied. The same causes of exemption from serving the office of constable are in general equally applicable to the office of overseer of the poor. (*See ante, p.* 669).

Upon an indictment against a defendant for refusing to serve the office of overseer, it was held that he was a substantial householder, within the stat. 43 *Eliz. c.* 2, and liable to serve such office, although he occupied a house and paid rent and taxes in the parish by means of a clerk only, but slept in another parish. *R.* v. *Poynder*, 1 *B. & C.* 178; 2 *D. & R.* 258; *and see R.* v. *Hall*, 2 *D. & R.* 241; 1 *B. & C.* 123.

# PART III.

## CONSPIRACY.

### *Indictment for a Conspiracy to charge a Man with a Crime.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, and A. his wife, and J. W., late of the same, carpenter, and E. W. late of the same, labourer, being evil-disposed persons, and wickedly devising and intending, not only to deprive one J. N. of his good name, fame, credit, and reputation, but also to subject him, as far as in them lay, to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty of [rape], on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, did, amongst themselves, conspire, combine, confederate, and agree together, falsely to charge and accuse the said J. N., that he, the said J. N. had then lately before [feloniously ravished and carnally known the said A., violently and against her will and consent]. AND THE JURORS AFORESAID, upon their oath aforesaid, do further present that the said J. S., and A. his wife, and J. W., and E. W., afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, in pursuance of, and according to, the said conspiracy, combination, confederacy, and agreement amongst themselves, had as aforesaid* [*here set out the overt acts, as in high treason; (see ante, p. 96 et seq.); introducing the second, and each of the subsequent acts, thus:* And the jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of, and according to, the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W. had as aforesaid, they the said &c. on &c., at *&c. &c., continuing the indictment from the above asterisk as thus*]: falsely and unlawfully, in the presence and hearing of divers persons, did charge and accuse the said J. N., with and of the rape aforesaid. AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that, in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, she the said A. afterwards, to wit, the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did, upon her oath, falsely charge and accuse the said J. N. before A. C., esquire, then and yet being one of the justices of our

said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds, committed in the said county, that he the said J. N. had then lately, before feloniously ravished and carnally known her the said A., violently and against her will and consent. AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that in further pursuance of, and according to, the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, she the said A., by the name of A., the wife of J. S., afterwards, to wit, at the general quarter sessions of the peace of our said lady the Queen, holden at the New Sessions House on Clerkenwell Green, in and for the county of Middlesex aforesaid, on Monday the —— day of May, in the year aforesaid, before A. B. and C. D., esquires, and others their associates, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, did falsely exhibit a certain bill, commonly called a bill of indictment, against the said J. N., by the name and addition of J. N., late of the parish of C., in the county of M., yeoman to P. C., esquire, [*here insert the names of the grand jurors to whom the indictment for rape was exhibited*], good and lawful men of the said county, then and there sworn and charged to inquire for our said lady the Queen, for the body of the said county; which said bill was, by the said jurors, then and there returned into the said court, before the justices of our lady the Queen last aforesaid, and others their fellows aforesaid, thus indorsed :—" Not found ;" which said bill is in these words, that is to say :—[*here set out the indictment verbatim ; and you may then add*, with intent to obtain and acquire to them the said J. S. and A. his wife, and the said J. W. and E. W., of and from the said J. N. divers sums of money for compounding the said pretended felony and rape so falsely charged upon the said J. N. as aforesaid, *if this be the fact, and that there will be no difficulty in proving it*]: to the great damage, scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *See the following precedents :—a conspiracy to charge a man with forgery*, 4 *Went.* 86 ; *sodomy*, *C. C. C* 126 ; *larceny*, *C. C. C.* 135, *and see* 3 *Bur.* 1320 ; *receiving stolen goods*, *C. C. C.* 125 ; *poisoning horses*, 4 *Went.* 98.

*Misdemeanor, fine or imprisonment, or both.*

*Justices in sessions, or the recorder of a borough, have no jurisdiction over the offence of illegal combination or conspiracy, except conspiracies or combinations to commit any offence which they have jurisdiction to try when committed by one person.* 5 *&* 6 *Vict. c.* 38, *s.* 1, (*ante*, *p.* 69).

A conspiracy is an agreement between two or more persons—1. Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling towards the party or for the purpose of extorting money from him.—2. Wrongfully to injure or prejudice a third person, or any body of men, in any other manner.—3. To commit any offence punishable by law.—4. To do any act with intent to pervert the course of justice.—5. To effect a legal purpose with a corrupt intent, or by improper means.—6. To

which may be added, conspiracies or combinations by journeymen to raise their wages, &c.

Thus, under the first head—a conspiracy to charge a man falsely with treason, felony, misdemeanor, is indictable; but it is not an indictable offence for two or more persons to consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion. *R.* v. *Best*, 1 *Salk.* 174; 2 *Ld. R.* 1167.

Under the second head—a conspiracy to impose pretended wine upon a man, as and for true and good Portugal wine, in exchange for goods; *R.* v. *Macarty et al.*, 2 *L. Raym.* 1179; a conspiracy by a female servant and a man whom she got to personate her master and marry her, in order to defraud her master's relations of a part of his property after his death; *R.* v. *Taylor et al.*, 1 *Leach*, 47; a conspiracy to injure a man in his trade or profession; *R.* v. *Eccles*, 1 *Leach*, 274; a conspiracy to charge a man as the reputed father of a bastard; 1 *Hawk. c.* 72, *s.* 2; a conspiracy to raise the prices of the public funds by false rumours, as being a fraud upon the public; 3 *M. & S.* 67; a conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen; *R.* v. *Roberts*, 1 *Camp.* 399; a conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm; *R.* v. *Hevey*, 2 *East, P. C.* 858; a conspiracy by violence, threats, contrivance, or other sinister means, to procure the marriage of a pauper of one parish to a pauper of another, in order to charge one of the parishes with the maintenance of both; *R.* v. *Tarrant*, 4 *Bur.* 2106: *R.* v. *Seward*, 1 *A. & El.* 706: *and see* 1 *East, P. C.* 461, 462; 8 *Mod.* 320; for these respectively, it has been holden an indictment will lie: (and now, by the stat. 7 & 8 *Vict. c.* 101, *s.* 8, the endeavour, by any officer of any union, parish, or place, to induce any person to contract a marriage by threat or promise respecting any application to be made, or any order to be enforced with respect to the maintenance of any bastard child, is in itself a misdemeanor). But an indictment will not lie for a conspiracy to kill game, or to commit any other mere civil trespass; *R.* v. *Turner*, 13 *East*, 228; or for a conspiracy to sell a man an unsound horse; *R.* v. *Pywell*, 1 *Stark.* 402; or for a conspiracy to deprive a man of an office under an illegal trading company. *R.* v. *Stratton*, 1 *Camp.* 549, *n.* If, however, the parties conspire to obtain money by false pretences of existing facts, it is no objection to the indictment for conspiracy, that the money was to be obtained through the medium of a *contract*. *Reg.* v. *Kenrick*, 5 *Q. B.* 49; 1 *Dav. & M.* 208.

Under the third head—a conspiracy to commit a felony or misdemeanor is indictable. *See R.* v. *Pollman*, 2 *Camp.* 229, *n.*

Under the fourth head—a conspiracy by certain justices of peace to certify that a highway was in repair, when they knew it to be otherwise, was holden to be indictable. *R.* v. *Mawby*, 6 *T. R.* 619. So, where several persons conspired to procure others to rob one of them, in order, by convicting the robber, to obtain the reward then given by statute in such case, and the party who accordingly committed the robbery was afterwards convicted and actually executed, these persons were indicted for the conspiracy, and convicted. *R.* v. *Macdaniel*, 1 *Leach*, 45; *Fost.* 130.

As to the fifth head, namely, effecting a legal purpose with a cor-

rupt intent, or by improper means, *see* 1 *Leach*, 38; 3 *Bur*. 1439; 1 *Wils*. 41; 8 *Mod*. 321. As to the sixth head, *see post*, *p*. 678.

1. The indictment must in the first place charge the conspiracy. And in stating the object of the conspiracy, the same certainty is not required as in an indictment for the offence, &c., conspired to be committed; as, for instance, an indictment for conspiring to defraud a person of "divers goods," has been holden sufficient. *Ante*, *p*. 44; *and see* 3 *Bur*. 1320. But a conspiracy to defraud the creditors of W. E. (not saying of what) is too general. *R*. v. *Fowle*, 4 *C*. & *P*. 492.

2. It is usual to set out the overt acts; that is to say, those acts which may have been done by any one or more of the conspirators, in order to effect the common purposes of the conspiracy. But this is not essentially necessary; the conspiracy itself is the offence; and whether anything have been done in pursuance of it or not, is immaterial. *R*. v. *Gill*, 2 *B*. & *Ald*. 204: *R*. v. *Seward*, 1 *Ad*. & *Ell*. 706: *R*. v. *Richardson*, 1 *M*. & *Rob*. 402: *Reg*. v. *Kenrick*, 5 *Q*.*B*. 49; 1 *Dav*. & *M*. 208; *and see* 2 *L*. *Raym*. 1167; 2 *Bur*. 993; 3 *Bur*. 1321; 13 *East*, 230, *n*. But an indictment charging that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandize, of great quantities of such merchandize, without paying for the same, with intent to obtain to themselves money and other profit, was held bad for not shewing by what means the parties were to be defrauded. *Reg*. v. *Peck*, 9 *Ad*. & *Ell*. 686; 1 *Per*. & *D*. 508. So also, a count charging that two of the defendants, being partners in trade, and indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership, for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments, to the great damage of the said creditors, was held bad for not alleging facts to shew in what manner the deed was fraudulent. *Ib*. But it was held that the indictment was not bad for not stating the names of the parties intended to be defrauded, since it could not be known who might fall into the snare. *Ib*. But where the indictment charged, that the defendants conspired to defraud certain of her Majesty's subjects, being tradesmen, of divers large quantities of their goods, and that one of the defendants, J. S., did, in pursuance of such conspiracy, fraudulently order and obtain on credit from A. & B., upholsterers in L., divers goods of great value, to wit, &c., of and belonging to the said A. & B., and from divers other tradesmen, whose names are to the jurors unknown, divers other goods of great value, to wit, &c., of and belonging to the said last-mentioned persons respectively; and in further pursuance of the said conspiracy, and in order that the said goods might be taken in execution and sold, did order and direct that the said goods should be delivered by the said tradesmen at the house of the said defendant; that no payment or satisfaction was made for the goods by the defendants; and that in further pursuance of the conspiracy, the said goods were taken in execution at the suit of some of the defendants, to satisfy fictitious debts pretended to be due to them from the defendant J. S.; it was held, by the court of Exchequer Chamber, that the statement of the conspiracy was defective, for not setting out the names or designating the class of the persons defrauded, and that the

defect was not aided by the allegation of the overt acts. *King* v. *Reg.*, *Trin. Vac.* 1845. An indictment for a conspiracy to obtain goods by false pretences, is bad unless it state whose property the goods were. *Reg.* v. *Parker*, 3 *Q. B.* 292; 2 *G. & D.* 709. (*See ante, p.* 293). If the indictment be general, the court will order the prosecutor to furnish a particular of the charges to be relied upon, but will not compel him to state the specific acts to be proved and the time and place at which they are alleged to have occurred. *R.* v. *Hamilton*, 7 *C. & P.* 448.

3. In an indictment for a conspiracy to indict or charge a man with an offence, it is not necessary to aver that the man is innocent of the offence; *R.* v. *Kinnersley*, 1 *Str.* 193; for he shall be presumed to be innocent until the contrary appear. *See R.* v. *Best*, 1 *Salk.* 174: *R.* v. *Spragg*, 2 *Burr.* 993. So, in an indictment for conspiring to pervert the course of justice, by producing a false certificate of justices of peace that a road indicted was in repair, in order to influence the judgment of the court, it is not necessary to allege that the defendants knew the certificate to be false; it is sufficient that they agreed to certify the fact as true, without knowing it to be so. *R.* v. *Mawbey*, 6 *T. R.* 619.

4. The venue may be laid in the county in which the conspiracy actually took place, or in a county in which any one of the defendants did an act in furtherance of the common object of the conspirators. (*Ante, p.* 25).

It may be necessary to observe, that it has been holden that the quarter sessions have jurisdiction of conspiracy. *R.* v. *Rispal*, 3 *Bur.* 1320; 1 *W. Bl.* 368: but see now the 5 & 6 *Vict. c.* 38, *s.* 1; (*ante, p.* 69).

## *Evidence.*

Prove the conspiracy as described in the indictment, and that the defendants were engaged in it; or prove circumstances from which the jury may presume it. *See R.* v. *Parsons*, 1 *W. Bl.* 392: *Reg.* v. *Murphy*, 8 *C. & P.* 297. And the prosecutor may go into general evidence of the nature of the conspiracy, before he gives evidence to connect the defendant with it. *R.* v. *Hammond*, 2 *Esp.* 718.

The acts and declarations, also, of any of the conspirators, in furtherance of the common design, may be given in evidence against all. (*Ante, p.* 491); *Reg.* v. *Shellard*, 9 *C. & P.* 277. And if any one overt act be proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties. (*Ante, p.* 491). *R.* v. *Bowes*, 4 *East*, 171, *n.* But before you give in evidence the acts of the conspirator against another, you must prove the existence of the conspiracy, that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design. (*Ante, p.* 491). Where the indictment charged the defendant with conspiracy with persons unknown, to defraud *J. D. and others*, and laid as overt acts that he falsely pretended to J. D. that he was a merchant named G., and under colour of a pretended contract with J. D. for the purchase of certain goods of *the said* J. D. and others, obtained goods of the said J. D. and others, with intent to defraud the said J. D. and others: it was held, that the word "J. D. and others" must throughout this indictment be taken to mean J. D. and others *his partners;* and therefore that evidence was not admis-

sible to shew attempts by the defendant to defraud other persons wholly unconnected with J. D. *Reg.* v. *Steel*, 2 *Mood. C. C.* 246; *C. & Mar.* 337.

The wife of one of the conspirators shall not be allowed to give evidence for or against the others. (*See ante, p.* 147).

A conspiracy must be by two persons at least; one cannot be convicted of it, unless he have been indicted for conspiring with persons to the jurors unknown. 1 *Hawk. c.* 72, *s.* 8. And a man and his wife cannot be indicted for conspiring together alone, because they are in law one person. (*Ante, p.* 17). But one person alone may be tried for a conspiracy, provided the indictment charge him with conspiring with others who have not appeared. *R.* v. *Kinnersley*, 1 *Str.* 193, or who are since dead. *R.* v. *Nichols*, 2 *Str.* 1227.

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### *Indictment for a Conspiracy to commit a Crime.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., shipowner, J. W., late of the same place, yeoman, and E. W., late of the same place, mariner, being evil-disposed persons and wickedly devising and intending to defraud and prejudice certain persons hereinafter mentioned, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, did amongst themselves conspire, combine, confederate, and agree together, falsely, and fraudulently to cheat and defraud certain underwriters hereinafter mentioned, of divers large sums of money: And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W., and E. W., afterwards, to wit, on the [*date of the policy*] in the year aforesaid, at the parish aforesaid, in the county aforesaid, in pursuance of, and according to, the said conspiracy, combination, confederacy, and agreement amongst themselves, had as aforesaid, did cause and procure a certain ship called the ———, and certain goods in and on board the said ship, to be insured by certain underwriters, to wit, by A. B., C. D., E. F., and G. H., and the said underwriters then and there severally a certain policy of insurance upon the said ship, and upon the said goods so laden on board the said ship as aforesaid, upon and for a voyage from the port of London to the island of Saint Vincent in the West Indies: And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W., and E. W., afterwards, and after the said ship sailed from the port of London aforesaid, upon the voyage aforesaid, to wit, on the fourth day of September, in the year aforesaid, in further pursuance of, and according to, the said conspiracy, combination, confederacy, and agreement among themselves, had as aforesaid, did remove and unlade from on board the said ship divers goods insured as aforesaid, of great value, to wit, of the value of four hundred pounds, before the said ship had reached the port or place of destination, aforesaid, to wit, at the parish aforesaid, in the county aforesaid: And the jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of, and according to, the said conspiracy,

combination, confederacy, and agreement amongst themselves, had as aforesaid, the said J. S., J. W., and E. W., afterwards, to wit, on the twentieth day of September, in the year aforesaid, on the high seas, to wit, at the parish aforesaid, in the county aforesaid, did cut, bore, and make, and did cause and procure to be cut, bored, and made, divers holes in the bottom and sides of the said ship or vessel, with intent thereby to sink, cast away, and destroy the said ship and the goods in and upon the said ship so laden as aforesaid, and with intent and design then and thereby wilfully and maliciously to prejudice the said several persons who had so underwritten the said policy of insurance upon the said ship, and upon the goods so therein and thereupon laden as aforesaid: to the great damage of the said A. B., C. D., E. F., and G. H., who had so underwritten the said policy as aforesaid and against the peace of our lady the Queen, her crown and dignity. *See the precedent,* 6 *Went.* 387; *and see the following precedents: of an indictment for a conspiracy to embezzle money collected on a brief, C. C. C.* 136; *to cheat a man out of money by pretending to secure to him an annuity,* 4 *Went.* 80, 89; *to get from a man his acceptances, upon pretence of getting them discounted,* 6 *Went.* 378; *to defraud a man of money under pretence of procuring a place, C. C. C.* 127, 133; *to blow up the walls of a prison, C. C. C.* 422; *to escape out of prison,* 4 *Went.* 116; *to raise the price of victuals (salt), C. C. C.* 130; *to obtain a* nolle prosequi *to an indictment by fraud, C. C. C.* 138; *to give a false certificate of a road being in repair,* 4 *Went.* 125; *and see R.* v. *Mawbey,* 6 *T. R.* 619; *to throw a burthen upon the parish, by the parish officers of another parish persuading a pauper of the former parish to marry a female pauper of their parish, C. C. C.* 128; 1 *A. & Ell.* 706; (*see now the* 7 *&* 8 *Vict. c.* 101, *s.* 8; *ante, p.* 674); *to bring a pregnant pauper to settle in a parish,* 4 *Went.* 124; *wrongfully to hold a man to bail,* 4 *Went.* 94; *to withdraw customers from a brewer,* 4 *Went.* 106; *to injure gunmakers in their trade,* 4 *Went.* 439; *to ruin a player in his profession,* 6 *Went.* 443; *to accuse a woman with incontinence with defendant, in order to make her marry him,* 4 *Went.* 79.

### *Evidence.*

As to the evidence, *see ante, p.* 676. Prove the conspiracy, either expressly, or prove one or more of the overts acts laid and that the defendants were either engaged in the commission of them or caused or procured their commission, from which the jury may fairly presume the conspiracy.

*As to combinations by workmen to enhance their wages, &c. &c., see forms of indictments at common law, C. C. C.* 127, 134; 4 *Went.* 100, 103, 113, 120; 6 *Went.* 375. *See also R.* v. *Bykerdike,* 1 *M. & Rob.* 179. *Assaults in pursuance of such combinations are now punishable with hard labour besides imprisonment, &c., by* 9 *G.* 4, *c.* 31, *s.* 25, *which repeals the former statutes upon this subject, and amends and consolidates their various provisions.* (*See ante, p.* 460).

# PART IV.

## ACCESSARIES, &c.

### PRINCIPALS IN THE SECOND DEGREE.

*Statutes.*

7 & 8 *G.* 4, *c.* 29, *s.* 61—*Punishment of Principals in the second Degree and Accessaries for Larcenies*]—Enacts, that in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

*7 & 8 *G.* 4, *c.* 30, *s.* 26—*Punishment of Principals in the second Degree and Accessaries for Malicious Injuries*]—Enacts, that in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person, who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 25—*Punishment of Principals in the second Degree and Accessaries, for Forgery*]—Enacts, that in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years. *See* 7 *W.* 4 & 1 *Vict.* *c.* 84, *s.* 3, (*ante, p.* 355).

2 *W.* 4, *c.* 34, *s.* 18—*Punishment of Principals in the second*

*Degree and Accessaries, for Coining*]—Enacts, that in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and in so far as relates to Scotland, every person who shall become accessary after the fact to any of the offences to which the punishment of transportation is by this act attached, shall, on conviction, be liable to be imprisoned for any term not exceeding two years; the general law of Scotland as to accession, or art and part, being in all other respects to regulate the punishments to be awarded under this act.

7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 7—*Punishment of Principals in the second Degree and Accessaries, for Offences against the Person*]—Enacts, that in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 6—*Punishment of Principals in the second Degree and Accessaries, &c., for Burglary and stealing in a Dwelling-house, &c*]—Enacts, that in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable, and every accessary after the fact to any felony punishable under this act (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 9—*Punishment of Principals in the second Degree and Accessaries, for Robbery and Stealing from the Person, &c.*]—*This section is verbatim the same as* 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 6.

7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 4—*Punishment of Principals in the second Degree and Accessaries, for Piracy.*]—*This section is verbatim the same as* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 7.

7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 11—*Punishment of Principals and Accessaries, for Burning, &c.*]—*This section is verbatim the same as* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 7.

7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 35—*Punishment of Principals and Accessaries, for Offences against the Post-Office*]—Enacts, that in the case of every felony punishable under the post-office acts, every principal in the second degree, and every accessary before the fact, shall be punishable in the same manner as the principal in the first degree is by the post-office acts punishable; and every accessary after

the fact to any felony punishable under the post-office acts (except against a receiver of any property or thing stolen, taken, embezzled, or secreted) shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor, punishable under the post-office acts, shall be liable to be indicted and punished as a principal offender.

## *Indictment.*

*After stating the offence of the principal in the first degree, and immediately before the conclusion of the indictment, charge the principal in the second degree thus*:—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously was present, aiding, abetting, and assisting the said J. S. the [felony and larceny] aforesaid to do and commit: against the peace, &c. *In an indictment for murder, this is inserted immediately before the concluding clause,* and so the jurors, &c.; *and this clause then charges both the principals in the first and second degree with the murder thus*]:—And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. and J. W. the said J. N. in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder; against the peace, &c. (*See ante*, p. 405).

*Where a statute creates a felony, and punishes with death persons guilty thereof, without making provision as to persons present aiding and abetting, principals in the second degree are thereby punishable with death, as well as principals in the first degree. R.* v. *Midwinter, Fost. App.* 415. *Coalheaver's case*, 1 *Leach*, 66. *So, where a statute makes a common law felony by name punishable with death, (as in the case of murder, rape, sodomy, robbery, and burglary), those present aiding and abetting in the offence are impliedly punishable with death, although the statute make no mention of them.* 1 *Hale*, 537; *Fost.* 359. *But where a statute imposes the punishment of death upon the person committing the offence, and not upon the offence by name, those present aiding and abetting merely are not punishable with death, that person only who actually committed the offence being deemed to be within the statute. Fost.* 356, 357; *R.* v. *Paget, Fost.* 355. *Yet, in this latter case, if the accessary be expressly within the statute as well as the person actually committing the offence, it must be deemed virtually to include the principal in the second degree by necessary implication. See R.* v. *Gogerly, R. & R.* 343. *This was the rule upon the construction of statutes before the abolition of the benefit of clergy, and it is still applicable, because no person can be punished with death, unless it be for some felony which was before excluded from the benefit of clergy, or made punishable with death by some subsequent statute.* 7 *&* 8 *G.* 4, *c.* 28, *s.* 7. *But this rule is now of less general importance, because the various statutes upon which these questions have arisen are now repealed; and by statutes* 7 *&* 8 *G.* 4, *c.* 29, *s.* 61, (*larceny*), 7 *&* 8 *G.* 4, *c.* 30, *s.* 26, (*malicious injuries*), 2 *W.* 4, *c.* 34, *s.* 18, (*coining*), 7 *W.* 4. *&* 1 *Vict. c.* 85, *s.* 7, (*offences against the person*), 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 6, (*burglary and stealing in the dwelling-house, &c.*), 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 9, (*robbery and stealing from the person*), 7 *W.* 4 *&* 1 *Vict. c.* 88,

*s. 4, (piracy), 7 W. 4 & 1 Vict. c. 89, s. 11, (burning, &c.), and 7 W. 4 & 1 Vict. c. 36, s. 35, (offences against the post-office), (which include the offences of most general occurrence), principals in the second degree in felonies punishable by these acts respectively, are punishable with death, or otherwise in the same manner as principals in the first degree.*

*Provisions applicable to principals in the second degree are also contained in most of the sections of the stat. 9 G. 4, c. 31, relating to offences against the person; and by stats. 11 G. 4 & 1 W. 4, c. 66, s. 25, (the forgery act), and 7 W. 4 & 1 Vict. c. 84, (ante, p. 355), principals in the second degree are punishable in the same manner as principals in the first degree. Where, however, upon the construction of any particular statute, principals in the second degree are not punishable with death, and no punishment is prescribed by the statute, then principals in the second degree may be transported for seven years, or imprisoned, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, (ante, p. 169), 7 & 8 G. 4, c. 28, s. 9, (ante, p. 554), not exceeding two years; and, if a male, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 G. 4, c. 28, s. 8, (ante, p. 554). See 7 & 8 G. 4, c. 28, s. 10, (ante, p. 169).*

*In the case of a felony at common law not punishable with death, and in cases of felony at common law or by statute, where the principal in the first degree is expressly, and the principal in the second degree is by construction of law, punishable with death, (vide supra), the pleader may charge the principal in the second degree either as principal in the first degree, (for proof that he was present aiding and abetting will in such a case maintain an indictment charging him with having actually committed the offence, see Mackally's case, 9 Co. 67 b; 1 Hale, 438; R. v. Towle, R. & R. 314, (ante, p. 60), or as being present aiding and abetting, as in the form above given, at his option. Reg. v. Crisham, 1 C. & Mar. 187. A., B., and C. were indicted for murder; in the first count, as principals in the first degree; and in the second, A. was indicted as a principal in the first degree, and B. and C. as principals in the second degree; the grand jury ignored the first count as to B. and C., and found a true bill on the second count against all; it seems that B. and C. might be convicted on the second count, though A. was acquitted. Reg. v. Phelps, C. & Mar. 180.*

## *Evidence.*

The defendant must be proved to have been present aiding and abetting in the commission of the offence.

Presence in this sense is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house watching to prevent surprise, or the like, whilst his companions are in the house committing the felony, such constructive presence is sufficient to make him a principal in the second degree. *Fost.* 350. *See R.* v. *Borthwick,* 1 *Dougl.* 207: *R.* v. *Gogerly, R. & R.* 343: *R.* v. *Owen,* 1 *Mood. C. C.* 96. But

he must be sufficiently near to give assistance; *R.* v. *Stewart*, *R. & R.* 363; and the mere circumstance of a party's going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be able to assist in it. *R.* v. *Kelly*, *R. & R.* 421. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards and then fetched the prisoner, who, being apprised of the robbery, assisted in carrying away the property, it was holden that he was not a principal, but only an accessary. *R.* v. *King*, *R. & R.* 332. *See R.* v. *M'Makin*, *Ib.*: *R.* v. *Dyer*, 2 *East*, *P. C.* 767. And although an act be committed in pursuance of a previously concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessaries before the fact. *R.* v. *Soare*, *R. & R.* 25; *R.* v. *Davis*, *Id.* 113: *R.* v. *Else*, *Id.* 142: *R.* v. *Badcock*, *Id.* 249: *R.* v. *Manners*, 7 *C. & P.* 801. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals. *R.* v. *Bingley*, *R. & R.* 446. *See* 2 *East*, *P. C.* 768. As if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C., and D. may be indicted for the forgery, and A. as an accessary; *R.* v. *Dade*, 1 *Mood. C. C.* 307; for, if several make distinct parts of a forged instrument, each is a principal, although he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *R.* v. *Kirkwood*, 1 *Mood. C. C.* 304.

There must also be a participation in the act; for although a man be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 *Hale*, 439; *Fost.* 350. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions, in order to prevent surprise; or remained at a convenient distance, in order to favour their escape, if necessary; or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions—in contemplation of law he was present aiding and abetting. So a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entice the owner away, that he who has the goods may carry them off, they are all guilty as principals. *R.* v. *Standley*, *R. & R.* 305; *and see R.* v. *Passey*, 7 *C. & P.* 282: *R.* v. *Lockett*, *Id.* 300. So it has been holden, that to aid and assist a person to the jurors unknown, to obtain money by ring-dropping,

is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of this practice. *R.* v. *Moore*, 1 *Leach*, 314. If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the attempt, he is a principal in the murder of the other. *R.* v. *Dyson*, *R.* & *R.* 523. *See R.* v. *Russell*, 1 *Mood. C. C.* 356: *R.* v. *Alison*, 8 *C.* & *P.* 418. So, likewise, if several persons combine for an unlawful purpose, or for a purpose to be carried into effect by unlawful means; (*see Fost.* 351, 352); particularly if it be carried into effect notwithstanding any opposition that may be offered against it; *Fost.* 353, 354; and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not, (*see the Sissinghurst-house case*, 1 *Hale*, 461), provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. 1 *Hawk. c.* 31, *s.* 52; *Fost.* 352: *R.* v. *Hodgson*, 1 *Leach*, 6: *R.* v. *Plumer*, *Kel.* 109. But the act must be the result of the confederacy; for if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R.* v. *White*, *R.* & *R.* 92. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground took from him his gun, pocket book, and money: *Park*, J., held this to be a robbery by Williams only. *R.* v. *Hawkins*, 3 *C.* & *P.* 392. The purpose must also be unlawful; for if the original object be lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree. *Fost.* 354, 355; 2 *Hawk. c.* 29, *s.* 9.

A mere participation in the act, without a felonious participation in the design, will not be sufficient. 1 *East, P. C.* 257; *R.* v. *Plumer*, *Kel.* 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 *Hale*, 446. So, on an indictment under the stat. 1 *Vict. c.* 85, *s.* 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life, with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge against B., that he should have been aware of A.'s intention to commit murder. *Reg.* v. *Cruse*, 8 *C.* & *P.* 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord *Hale* considers that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree. 1 *Hale*, 442, 452: but see *R.* v. *Perkins*, 4 *C.* & *P.* 537: *R.* v. *Murphy*,

6 *C. & P.* 103: *Reg.* v. *Young*, 8 *C. & P.* 645: *Reg.* v. *Cuddy*, 1 *C. & K.* 210; (*ante, p.* 6).

If the principal were insane at the commission of the act, no person can be convicted as an aider and abettor of the act. *Reg.* v. *Tyler*, 8 *C. & P.* 616; (*ante, p.* 6).

ACCESSARIES BEFORE THE FACT.

*Statutes.*

7 *G.* 4, c. 64, *s.* 9—*Accessaries before the Fact, when and where tried.*]—For the more effectual prosecution of accessaries before the fact to felony, be it enacted, that if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding, shall be deemed guilty of felony, and may be indicted and convicted, either as an accessary before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessary before the fact to the same felony, if convicted as an accessary, may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed without the body of any county, and the offence of counselling, procuring, or commanding, shall have been committed within the body of any other county, the last-mentioned offence may be inquired of, tried, determined, and punished in either of such counties: provided always, that no person, who shall be once duly tried for any such offence, whether as an accessary before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

Sect. 11—*Accessaries may be tried after Conviction of Principal.*]—And, in order that all accessaries may be convicted and punished in cases where the principal felon is not attainted, be it enacted, that if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessary, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be admitted to the benefit of clergy, or pardoned or otherwise delivered before attainder; and every such accessary shall suffer the same

punishment, if he or she be in anywise convicted, as he or she should have suffered if the principal had been attainted.

9 *G.* 4, *c.* 31, *s.* 31—*Punishment of Accessaries for Injuries to the Person.*]—Enacts, that every accessary before the fact to any felony punishable under this act, for whom no punishment has been hereinbefore provided, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years; and every accessary after the fact to any felony punishable under this act, except murder, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and every person who shall counsel, aid, or abet the commission of any misdemeanor punishable under this act shall be liable to be proceeded against and punished as a principal offender.

*Indictment of, together with the Principal.*

*After charging the principal with the offence, and immediately before the conclusion of the indictment, charge the accessary thus:* —And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, before the said [felony and larceny] was committed in form aforesaid, to wit, on the first day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command, the said J. S. the said [felony and larceny] in manner and form aforesaid to do and commit; against the peace, &c., &c. *The act of accessary before the fact is described in the several statutes creating new felonies, or punishing with death the principals and accessaries in felonies at common law, in different terms. In prudence, perhaps, it will be better to pursue the words of the statute upon which the indictment is framed, in describing the offence of the accessary; but if the statute do not mention accessaries, or in the case of a felony at common law, the words in the above form, "incite, move, procure," &c., will be sufficiently indicative of the offence. And even where the statute does expressly describe the offence of accessary in terms, it is not absolutely necessary to describe it in the same terms in the indictment; a description in equivalent terms will be sufficient: thus, where the words in the statute were "command, hire, or counsel," and in the indictment "excite, move, and procure," the indictment was holden good: because the words were of the same legal import. R.* v. *Grevil,* 1 *And.* 195. *A man may be indicted as accessary to one of several principals, or to all; and if he be indicted as accessary to all, he may be convicted on such indictment as accessary to one or some of them. Lord Sanchar's case,* 9 *Co.* 119; *Fost.* 361; 1 *Hale,* 624. (*See ante, p.* 26). *An indictment charging that* a certain evil-disposed person *feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, is bad as against A. B. Reg.* v. *Caspar,* 2 *Mood. C. C.* 101; 9 *C. & P.* 289. *As to the venue, see ante, p.* 26.

*The offence of accessary before the fact is felony, but is not punishable with death except it be so expressly provided by statute. Accessaries*

*before the fact to murder are punishable with death.* 9 G. 4, c. 31, s. 3, (*ante, p.* 403). *Accessaries to administering poison, and attempts to drown, suffocate, or strangle, and to maliciously shooting and stabbing, with intent to murder or maim, are punishable as principals, &c.* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 7, (*ante, p.* 680). *So are accessaries to administering poison to procure abortion. Ib. So are accessaries to the forcible abduction of women for lucre.* 9 *G.* 4, *c.* 31, *s.* 19, (*ante, p.* 475). *So are accessaries to child stealing.* 9 *G.* 4, *c.* 31, *s.* 21, (*ante, p.* 478). *So are accessaries to bigamy.* 9 *G.* 4, *c.* 31, *s.* 22, (*ante, p.* 628). *And accessaries to any felony punishable under stat.* 9 *G.* 4, *c.* 31, *for whom no punishment is otherwise provided, may be transported for not more than fourteen nor less than seven years, or imprisoned with or without hard labour, not exceeding three years.* 9 *G.* 4, *c.* 31, *s.* 31. *Accessaries before the fact to felonies within the statutes* 7 *&* 8 *G.* 4, *c.* 29; 7 *&* 8 *G.* 4, *c.* 30; 11 *G.* 4 *&* 1 *W.* 4, *c.* 66; 2 *W.* 4, *c.* 34; 7 *W.* 4 *&* 1 *Vict. c.* 85; 7 *W.* 4 *&* 1 *Vict. c.* 86; *and* 7 *W.* 4 *&* 1 *Vict. c.* 87; 7 *W.* 4 *&* 1 *Vict. c.* 88; 7 *W.* 4 *&* 1 *Vict. c.* 89; *and* 7 *W.* 4 *&* 1 *Vict. c.* 36, *respectively, are punishable with death or otherwise, in the same manner as principals in the first degree,* 7 *&* 8 *G.* 4, *c.* 29, *s.* 61, (*ante, p.* 679); 7 *&* 8 *G.* 4, *c.* 30, *s.* 26, (*ante, p.* 679); 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 25, (*ante, p.* 679); 2 *W.* 4, *c.* 34, *s.* 18, (*ante, p.* 680); 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 7; 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 6; 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 9; 7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 4; 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 11; *and* 7 *W.* 4 *&* 1 *Vict. c.* 36, *s.* 35, (*ante, p.* 680). *In many statutes also specific punishments are provided for accessaries before the fact, in which cases accessaries must be punished under the particular statute; but where no punishment is provided, then accessaries may be transported for seven years, or imprisoned (with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, *c.* 28, *s.* 9, (*ante, p.* 554), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding two years, and if a male, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, *c.* 28, *s.* 8, (*ante, p.* 554).

It may be necessary to observe, that it is only in felonies that there can be accessaries; in high treason, every instance of incitement, &c., which in felony would make a man an accessary before the fact, will make him a principal traitor, *Fost.* 341, and he must be indicted as such. 1 *Hale*, 238. Also, all those who in felony would be accessaries before the fact, in offences under felony are principals, and must be indicted as such. 4 *Bl. Com.* 36; *Reg.* v. *Clayton*, 1 *C. & K.* 128; *Reg.* v. *Moland*, 2 *Mood. C. C.* 276. In manslaughter, however, there can be no accessaries before the fact, for the offence is sudden and unpremeditated; and therefore, if A. be indicted for murder, and B. as accessary, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale*, 347, 450, 616.

Formerly an accessary could not, without his own consent, unless tried with the principal, be brought to trial until the guilt of his principal had been legally ascertained by conviction, (1 *A. st.* 2, *c.* 9), or outlawry. *Fost.* 360; 1 *Hale*, 623. And even in high treason the accessary, (if he may be so termed), unless he can be indicted for compassing the King's death, must still be tried either with the principal, or after the principal's attainder; 1 *Hale*, 625; and the

same in offences under felony. But now, assessaries before the fact to any felony, whether at common law or by statutes made or to be made, shall be deemed guilty of felony, and may be indicted as accessaries before the fact with the principal, or after the conviction (7 *G.* 4, *c.* 64, *s.* 11) of the principal, or for a substantive felony, whether the principal shall or shall not have been convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as if convicted as accessaries before the fact. 7 *G.* 4, *c.* 64, *s.* 9, (*ante, p.* 685). This statute only applies where the accessary might at common law have been indicted with or without the conviction of the principal; and therefore where a defendant was indicted as accessary before the fact to the murder of S. N., she having by his procurement killed herself, it was holden that the statute did not apply. *R.* v. *Russell,* 1 *Mood. C. C.* 356: *Reg.* v. *Leddington,* 9 *C. & P.* 79. Where the principal and accessary are tried together, (which is in general the best and most usual way), if the principal plead otherwise than the general issue, the accessary shall not be bound to answer until the principal's plea be first determined. 9 *H.* 7, 19; 1 *Hale,* 624; 2 *Inst.* 184. So also, where the principal does not appear to take his trial, but the accessary does, the latter is not compellable to plead. *Reg.* v. *Ashmall,* 9 *C. & P.* 236. But if the general issue be pleaded, then the jury shall be charged to inquire first of the principal, and, if they find him not guilty, then to acquit the accessary; but if they find the principal guilty, they are then to inquire of the accessary. 1 *Hale,* 624; 2 *Inst.* 184. Even in a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessary charged in the same indictment as accessary before the fact to the said "*felony and burglary,*" and the jury acquitted the principal of the burglary, but found him guilty of the larceny—it seems the judges were of opinion that the accessary should have been acquitted; for the indictment charged him as accessary to the burglary only, and the principal being acquitted of that, the accessary should be acquitted also. *R.* v. *Donnelly & Vaughan, R. & R.* 310; 2 *Marsh.* 571.

### *Evidence.*

The prosecutor, after proving the guilt of J. S., must prove that J. W. had previously procured, hired, advised, or commanded J. S. to commit the larceny; and whether this were done directly or through the intervention of a third person is immaterial. *Fost.* 125. (*See ante, p.* 7).

As it is essential to constitute the offence of accessary, that the party should be absent at the time the offence was committed, 1 *Hale,* 615, 616, if it appear, therefore, that J. W. was present when the larceny in question was committed, he must be acquitted; *R.* v. *Gordon,* 1 *Leach,* 515; for the minor offence of accessary is merged in the greater one of principal.

The accessary, on the other hand, may controvert the guilt of his principal. *Fost.* 365. So, he may prove that, after he had so ordered, hired, or advised J. S., he repented of it, and actually countermanded the order, &c. 1 *Hale,* 617. So, if it appear that the accessary ordered or advised one crime, and that the principal committed another; as, for instance, if he commanded J. S. to burn a house, and instead

of doing so he committed a larceny, he must be acquitted. 1 *Hale*, 617. So, if J. W. ordered J. S. to commit a crime against A., and, instead of doing so, he wilfully committed the same crime against B., J. W. would not be answerable as accessary; but if J. S, had committed the offence against B. by mistake, instead of A., it seems it would be otherwise; *Fost.* 370 *et seq.; but see* 1 *Hale*, 617; 3 *Inst.* 51. But it is clear that the accessary is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he dies, A. is accessary to the murder. 4 *Bl. Com.* 37; 1 *Hale*, 617. Or if A. command B, to burn the house of C., and in doing so the house of D. is also burnt, A. is accessary to the burning of D.'s house. *Plowd.* 475. So if the offence commanded be effected, although by different means from those commanded; as, for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him, J. W. is, nevertheless, liable as accessary. *Fost.* 369, 870.

*Indictment against an Accessary before the Fact, the Principal being convicted.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the general sessions of the delivery of the goal of, &c. &c.—[*so continuing the caption of th eindictment against the principal,*]—it was presented upon the oaths of &c., that one J. S., late of &c.—[*continuing the indictment to the end, reciting it however, in the past, and not in the present tense*]; upon which said indictment the said J. S., at the session of the gaol delivery aforesaid, was duly convicted of the [felony and larceny] aforesaid: as by the record thereof more fully and at large appears*. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, before the said [felony and larceny] was committed in form aforesaid, to wit, on the first day of May, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did feloniously, and maliciously incite, move, procure, aid, counsel, hire, and command the said J. S. the said [felony and larceny] in manner and form aforesaid to do and commit: against the peace, &c., *as in ordinary cases. In setting out the indictment against the principal, it is not sufficient to allege that "at the sessions of gaol delivery, &c., it was presented," &c., without saying by whom, and on oath, &c. Reg.* v. *Butterfield*, 2 *M. & Rob.* 522. *As to the venue, see ante, p.* 26.

*Evidence.*

1. The prosecutor must prove the conviction of the principal. Where the accessary is tried in the same county in which the principal was convicted, this is easily effected by the clerk of assize or clerk of the peace attending at the trial with the record. But if the accessary be tried in a different county, it is necessary to produce either the record itself, or at least an examined copy of it. (*See ante, p.* 126).

But although the record of conviction is evidence of the guilt of the principal, yet it is not such conclusive evidence as to preclude the ac-

cessary from proving the principal's innocence, if he can. *Fost.* 365—368. *R.* v *Smith*, 1 *Leach*, 228.

2. Having proved the guilt of the principal, prove the accessary's guilt, as directed *ante, p.* 688.

*Indictment against an Accessary before the Fact, as for a substantive Felony.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that one J. S., late of the parish of B., in the county of M., labourer, [*or*, that some person or persons to the jurors aforesaid unknown], on the third day of August, in the fourth year, [*&c. &c., stating the felony, exclusive of the conclusion,* " against the peace," *&c.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, before the said [felony and larceny] was committed in form aforesaid, to wit, on the first day of August, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said J. S. [*or*, the said person or persons to the jurors aforesaid unknown as aforesaid] the said [felony and larceny] in manner and form aforesaid to do and commit: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*See ante, p.* 681). *An indictment is properly framed as for a substantive felony, which states in the first place, that the principal committed the felony, and then that the defendant incited, moved, &c, him to commit it; although the principal has not been tried, and does not appear to be amenable to justice. Reg.* v. *Wallace, C. & Mar.* 200; 2 *Mood. C. C.* 200.

*Evidence.*

Prove the felony as already directed *ante, passim:* and then prove the defendant's guilt as accessary, as directed *ante, p.* 688.

If the principal felon be known, the indictment must charge the felony, &c., to have been committed by him, and not by a person unknown. *R.* v. *Walker*, (*ante, p.* 37); *and see Reg.* v. *Casper*, (*ante, p.* 686).

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ACCESSARIES AFTER THE FACT.

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*Statute.*

7 *G.* 4, *c.* 64, *s.* 10.—*Accessaries after the Fact to Felony, when and where tried.*]—And, for the more effectual prosecution of accessaries after the fact to felony, be it enacted, that if any person shall become an accessary after the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessary,

had been committed at the same place as the principal felony, although such act may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and th t, in case the principal felony shall have been committed within the body of any county, and the act, by reason whereof any person shall have become accessary, shall have been committed within the body of any other county, the offence of such accessary may be inquired of, tried, determined, and punished, in either of such counties: provided always, that no person who shall be once duly tried for any offence of being an accessary shall be liable to be again indicted, or tried for the same offence.

### *Indictment against, with the Principal.*

*After stating the offence of the principal, and immediately before the conclusion of the indictment, charge the accessary after the fact thus* ]:—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the said J. S. to have done and committed the said [felony and larceny] in form aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. S. did feloniously receive, harbour, and maintain; against the peace, *&c., as in ordinary cases. As to receiving stolen goods, &c., see ante, p.* 268. *As to the venue, see ante, p.* 26.

*Although in high treason there are no accessaries after the fact, those who in felony would be accessaries after the fact being principals in high treason: yet in their progress to conviction, they must be treated as accessaries, and indicted specially for the receipt, &c., and not as principal traitors.* 1 *Hale*, 238. *In offences under felony, there is no penalty inflicted by the common law for receiving, harbouring, or maintaining the principal;* 1 *Hale*, 613; *but in some few cases, it is made punishable by statute. Yet in these cases, if the act of the receiver amount to a rescue, or to the obstructing an officer of justice in the execution of his duty, or the like, he would undoubtedly be indictable for it as for a misdemeanor.* 2 *Hawk. c* 29, *s.* 4. (*See ante, p.* 559). *In felonies at common law, the offence of the accessary is a felony; but he is not punishable with death by a statute imposing the punishment of death on the principal, unless the statute in terms extend to receivers also. In felonies created by statute,—if the statute make no mention of accessaries, accessaries after the fact are punishable as for a felony; see* 3 *Inst.* 59; *if it mention accessaries before the fact, but not accessaries after, the latter, according to Lord Hale,* (1 *Hale*, 235, 236, 328), *are not punishable; Hawkins, however, is of a different opinion;* 2 *Hawk. c.* 29, *s.* 14; *but if it mention receivers, &c., they are in that case punishable in the manner directed by the statute. Accessaries after the fact to murder may be transported for life, or imprisoned, with or without hard labour, not exceeding four years.* 9 *G.* 4, *c.* 31, *s.* 3, (*ante, p.* 403). *Accessaries to other offences within the statute* 9 *G.* 4, *c.* 31, *may be imprisoned, with or without hard labour, not exceeding two years.* 9 *G.* 4, *c.* 31, *s.* 31, (*ante, p.* 686). *Accessaries to offences within the* 7 *&* 8 *G.* 4. *c.* 29; 7 *&* 8 *G.* 4, *c.* 30; 11 *G.* 4 *&* 1 *W.* 4, *c.* 66; 2 *W.* 4, *c.* 34; 7 *W.* 4 *&* 1 *Vict. c.* 85; 7 *W.* 4 *&* 1 *Vict. c.* 86; 7 *W.* 4 *&* 1 *Vict. c.* 87; 7 *W.* 4 *&* 1 *Vict. c.* 88; 7 *W.* 4 *&* 1 *Vict. c.* 89, *and* 7 *W.* 4 *&* 1 *Vict. c.* 36, *respectively, may be imprisoned not exceeding two years, with or without*

*hard labour, and with or without solitary confinement, such confinement, not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169); 7 & 8 *G.* 4, *c.* 29, *s.* 61, (*ante, p.* 679); 7 & 8 *G.* 4, *c.* 30, *s.* 26, (*ante, p.* 679); 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 25, (*ante, p.* 679); 2 *W.* 4, *c.* 34, *s.* 18, (*ante, p.* 680); 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 7; 7 *W.* 4 & 1 *Vict. c.* 86, *s.* 6; 7 *W.* 4 & 1 *Vict. c.* 87, *s.* 9; 7 *W.* 4 & 1 *Vict. c.* 88, *s.* 4; 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 11; *and* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 35; (*ante, p.* 680). *Where accessaries after the fact are punishable as for a felony, but no specific punishment is provided by the particular statute, they may be transported for seven years, or imprisoned with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 & 8 *G.* 4, *c.* 28, *s.* 9, (*ante, p.* 554), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 & 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169); *and, if a male, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 & 8 *G.* 4, *c.* 28, *s.* 8, (*ante, p.* 554).

*Accessaries after the fact cannot be tried before the conviction or attainder of their principal, unless they consent to it.* 1 *Hale,* 623; 2 *Hawk. c.* 29, *s.* 45. *They may, however, be tried with their principal;* 1 *Hale,* 623; *or separately, after the principal has been convicted,* 7 *G.* 4, *c.* 64, *s.* 11, *or attainted.* (*See ante, p.* 10). *But no person who shall be once duly tried for any offence of being accessary shall be liable to be again indicted and tried for the same offence.* 7 *G.* 4, *c.* 64, *s.* 10, (*ante, p.* 690).

### *Evidence.*

1. The prosecutor must prove the principal guilty of the felony charged against him by the indictment, as in ordinary cases.

2. He must prove that J. W. received, harboured, or maintained the principal, after he had so committed the felony; as, for instance, that he concealed him in his house, *Dalt.* 530, 531, or shut the door against his pursuers, until he should have an opportunity of escaping, 1 *Hale,* 619, or took money from him to allow him to escape, 9 *H.* 4, 1, or supplied him with money, a horse, or other necessaries, in order to enable him to escape, *Hale, Sum.* 218; 2 *Hawk. c.* 29, *s.* 26, or that the principal was in prison, and J. W. bribed the gaoler to let him escape; or conveyed instruments to him to enable him to break prison and escape. 1 *Hale,* 621.

But merely suffering the principal to escape will not make the party an accessary after the fact; for it amounts at most but to a mere omission. 9 *H.* 4, *f.* 1; 1 *Hale,* 619. So, if a person supply a felon in prison with victuals or other necessaries for his sustenance; 1 *Hale,* 620; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon; 1 *Hale,* 332; or if a person speak or write in order to obtain a felon's pardon or deliverance; 26 *Ass.* 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly, 3 *Inst.* 139; 1 *Hale,* 620, or even if he himself agree, for money, not to give evidence against the felon, *Moor,* 8, or know of the felony and do not discover it: 1 *Hale,* 371, 618: none of these acts would be sufficient to make the party an accessary after the fact. He must be proved to have done some act to assist the felon personally. *Reg.* v. *Chapple,* 9 *C.* & *P.* 355. But if he employ another person to harbour

or relieve the felon, he will be equally guilty as if he did so himself. *R.* v. *Jarvis*, 2 *M.* & *Rob.* 40.

A wife is not punishable as accessary, for receiving, &c., her husband, although she know him to have committed felony, 1 *Hale*, 48, 621, for she is presumed to act under his coercion. (*See ante, p.* 9). But no other relationship of parties can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. *Id.*

3. It must be proved that J. W., at the time he received or assisted the principal felon, knew that he had committed a felony. This knowledge may be proved either from the defendant's admissions, or the like, or by evidence of circumstances from which the jury may fairly presume it. (*See ante, p.* 122). *R.* v. *Beveridge*, 3 *P. Wms.* 439.

*Indictment against an Accessary after the Fact, the Principal being convicted.*

*Proceed as in the precedent, ante, p.* 691, *to the asterisk; and then thus*]:—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the said J. S. to have done and committed the said [felony and larceny] aforesaid, after the same was so committed as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. S. did feloniously receive, harbour, and maintain, against the peace, &c. &c., *as in ordinary cases. Prove the conviction of the principal, as directed ante, p.* 691; *and the guilt of the accessary, as directed ante, p.* 692.

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*Indictment for Soliciting a person to commit an Offence.*

Middlesex to wit:—The jurors for our lady the Queen upon their oath present, that J. S., late of the parish of B., in the county of M., labourer, on the third day of August, in the fourth year of the reign of our sovereign lady Victoria, falsely, wickedly, and unlawfully, did solicit and incite one J. W., a servant of one J. N., to take, embezzle, and steal a large quantity, to wit, one hundred pounds weight of cotton twist, of the value of ——, of the goods and chattels of his master, the said J. N.; to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Misdemeanor, fine or imprisonment, or both. R.* v. *Higgins*, 2 *East*, 5.

*Evidence.*

Prove the soliciting or inciting, as alleged in the indictment. Prove it in the same manner as you would prove the offence of accessary before the fact, with the exception of proving the larceny or embezzlement committed; if it appear that J. W. actually committed the offence to which he was incited by J. S., J. S. must be acquitted; for the misdemeanor in that case would be merged in the felony. *See R.* v. *Higgins*, 9 *East*, 5.

# PART V.

## SUBSEQUENT FELONY.

### *Statute.*

*7 & 8 G. 4, c.* 28, *s.* 11.]—And whereas it is expedient to provide for a more exemplary punishment of offenders who commit felonies after a previous conviction for felony, whether such conviction shall have taken place before or after the commencement of this act: be it therefore enacted, that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment; and in any indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerks of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of six shillings and eight pence, and no more, shall be demanded and taken), shall, with proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy, shall utter a false certificate of any indictment and conviction for a previous felony, or if any person other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony; and, being lawfully convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment.

6 & 7 *W.* 4, *c.* 111—*Course of Proceeding*]—Enacts, that it shall not be lawful on the trial of any person for any subsequent felony to charge the jury to inquire concerning such person's conviction, until

after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any statement such person's conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid: provided nevertheless, that if upon the trial of any person for any such subsequent felony as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony.

### *Indictment for a subsequent Felony after a prior Conviction for Felony.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at &c., [*describing the court where the defendant was tried and convicted*], on the —— day of ——, in the eighth year of the reign of our sovereign lady Victoria, J. S. was then and there convicted of felony, and which said conviction is still in full force, strength, and effect, and not in the least reversed, annulled, or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish of B., in the county aforesaid, labourer, being so convicted of felony as aforesaid, afterwards, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, with force and arms, at the parish last aforesaid, in the county last aforesaid, [*three pairs of shoes of the value of twelve shillings, one shirt of the value of four shillings, and one waistcoat of the value of seven shillings*], of the goods and chattels of J. N., then and there being found, then and there feloniously did steal, take, and carry away; [*describing some felony not punishable with death, as in the precedents, ante, passim*]: against the form of the statute in that case made and provided, and against the peace of our lady the Queen, her crown and dignity. *It is sufficient to state that the defendant was at a certain time and place convicted of felony, without otherwise describing the previous felony.* 7 *&* 8 *G.* 4, c. 28, *s.* 11: *nor is it necessary to state the judgment. Reg.* v. *Spencer,* 1 *C. & K.* 159.

*Transportation for life or for not less than seven years, or imprisonment, (with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement,* 7 *&* 8 *G.* 4, c. 28, *s.* 9, (*ante, p.* 554), *such confinement not exceeding one month at any one time, nor three months in any one year,* 7 *W.* 4 *&* 1 *Vict. c.* 90, *s.* 5, (*ante, p.* 169)), *not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit.* 7 *&* 8 *G.* 4, c. 28, *s.* 11.

### *Evidence.*

The allegations, in the order in which they occur in the indictment, are, 1. The previous conviction, which is proved by a certificate, (*see ante, p.* 126), with evidence of the identity of the defendant. And in

order to prove the identity, it is not essential to call a witness who was present at the trial to which the certificate refers; it is sufficient to prove that the defendant is the person who underwent the sentence mentioned in the certificate. *Reg.* v. *Crofts*, 9 *C.* & *P.* 219. The certificate must state that *judgment* was given for the previous felony; it is not sufficient for it to state a *conviction*. *Reg.* v. *Ackroyd*, 1 *C.* & *K.* 158. And, 2. The subsequent felony, which is proved as in other cases. *See the different titles.*

Considerable difficulty formerly existed as to the course to be pursued under this statute. A prejudice was created in the minds of the jurors by a knowledge of the previous conviction, and yet in strictness that circumstance could not be withheld from their knowledge. To remedy this, the stat. 6 & 7 *W.* 4, *c.* 111, was passed, and now the prisoner must be arraigned, and the jury must be charged, and the evidence proceed, as if the indictment did not contain the averment of a previous conviction; and this allegation must not be opened to the jury, or their verdict taken upon it, until after they have found the prisoner guilty of the subsequent felony, and then the prosecutor must prove the previous conviction and identity of the defendant, and upon this likewise the jury must deliver their verdict. If, however, the defendant call witnesses to character, (or if, by the cross-examination of the witnesses for the prosecution, evidence to character be elicited, *Reg.* v. *Gadbury*, 8 *C.* & *P.* 676), the previous conviction may be proved in reply, and the compound question will, in that case, be left to the jury in the first instance.

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